From the Present To the Past

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Scott L. Rubin 2008-2009
Allyson Hughes 2007-2008
Tom Sasser 2006-2007

Jorge Cestero 2005-2006
Hon. Renee Goldenberg 1995-1996
Hon. Mark Polen 1994-1995
A. Matthew Miller 1992-1993

Cynthia Greene 1989-1990
Donald J. Sasser 1988-1989
Lewis Kapner 1985-1986
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2014

July 31
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The Commentator is prepared and published by the Family Law Section of The Florida Bar.

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Articles and cover photos to be considered for publication may be submitted to Amy Hamlin, Editor, at Amy@aikinlaw.com.

MS Word format is preferred for documents, and jpg images for photos.
I cannot believe it is actually May, 2014... in a few short weeks my year as Chair of this amazing Section will come to an end. From the beginning of my time with the Family Law Section, back in 2003, I was always motivated by the camaraderie and friendships I saw that developed between the members. My involvement first started with committee work, sitting in on a few committees at annual meeting, but I did not really become involved with the Section until 2004, as a result of a chance meeting with Evan Marks (the Chair of the Section at that time) and an opportunity to serve on a newly formed “Equal Timesharing Ad Hoc Committee” that eventually evolved into the group that drafted the parenting bill that ultimately became the “new” Section 61.13, Florida Statute. I am a fairly outgoing person, but it took time to get to know people and to feel like I was truly involved. For me, the shift occurred while attending an out of state retreat in Breckenridge. It was intimate, a small town, lots of group activities, and I was able to meet and get to know people that I am still fortunate to call my friends, like Jorge Cestero, Dr. Deborah Day and her husband Raul, among many others.

Gradually, I became more involved and was appointed Chair of the Children’s Issues Committee, then Secretary of Legislation, ultimately chairing the Legislation Committee four non-consecutive years. Diane Kirigin was the Chair of Legislation at the time I became involved, and her tutelage and assistance really helped develop my passion for legislation. During my time with the Section, I have been one of the co-Chairs of the Certification Review Course, secretary of CLE and written for Publications. My involvement has been varied, but without question, my passion became legislation and likely still is to this day.

Why do I tell you all this? We recently had the out of state retreat in Las Vegas. It was well attended, but by many unfamiliar faces, people that I do not usually see at meetings and events. That was wonderful! The retreat was jam packed with amazing things to do, beginning with a cocktail reception at the Bellagio. Thursday and Friday seminars were fabulous... continued, next page

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Chair's Message
from preceding page

with Mark O'Mara, Dr. Deborah Day and Chris and Shannon Carlyle as speakers. My favorite part, without question, was the helicopter tour of the Grand Canyon, included in the registration fee. It was breathtaking, and I checked off another thing on my bucket list – handstand in the Grand Canyon! Friday night we went as a group to see "O" and rounded out the weekend with impromptu Bloody Mary/Mimosa breakfast meeting Saturday and group dinner Saturday night. It was truly a great retreat!

It also gave me an opportunity to talk to individuals I have not met before. When I asked them why they attended the retreat, many of them said they felt they could not get a foot in the door with the Section. They came to a meeting and felt like they were ignored, were in the way, or that there was not a place for them. A few of these individuals made a valiant effort at involvement but felt like there was a clique with a secret password needed to break in... that made me sad... in my year of happy... that made me sad.

So, how do you get involved? How do you get noticed... showing up is part of the battle, stepping up is too... offer to join subcommittees, offer your comments... but at the end of the day, even if you do all that... if the people already involved are not paying attention, you still won't get noticed. So the purpose of my message for this Commentator is to remind us, the active Section members, to slow down at meetings... To pay attention to those around us, and not just our friends who we only get to see a few times a year. More importantly, look for the new faces, the ones you have never seen before, the ones you may never see again if you do not take a few minutes to say hi. It is easy to be caught up in the hustle and bustle of the work we are there to do. We need to remember that without new people, the process will stop. It is not personal, the members of the Executive Council, Executive Committee and active committee participants are fun loving, friendly, smart, amazing people... but we all forget some-times. So with Annual Meeting coming up in June, I challenge each of us, myself included, to meet 5 new faces, make everyone feel welcome and help grow this amazing organization so it can continue to do the good work it has for the past 40 years.

—Elisha Roy
As the guest editor for this issue, my goal has been to provide an educational yet practical issue for fellow family law practitioners to use for years to come. When deciding how to arrange the varied issues covered by our esteemed authors, I decided to fall back on the tried and true acronym: PEACE (Parenting, Equitable Distribution, Alimony, Child Support, and, Everything Else). Of course, we would be remiss if we did not take care of ourselves first.

I would like to thank the authors for offering their insight and perspective on these issues; Lissette Gonzalez, who assisted me with co-editing a majority of the articles; and, the Publications Chair, Amy Hamlin, for all of her help and support.

Cary Stamp has provided us with a wonderful article regarding taking care of ourselves financially. Lori Caldwell-Carr has provided us with her view of a less stressful family law practice with her reasons for practicing collaborative family law.

As for our clients, we begin by addressing parenting issues. The Honorable Sally Kest provides us with a relocation refresher. We, then, move on from parenting to equitable distribution, Matthew Lundy, Heather Moe, and, Rod Moe tell us when we should hire a valuation expert. Marc Brawer and Jerry Reiss provide their in-depth views and advice regarding the financial aspects of dissolutions of marriage. Keeping with that theme, William Cantrell warns us of the most common mistakes made when drafting Qualified Domestic Relations Orders.

We bypass alimony and go directly to child support. Raul Perez-Ceballos provides us with a thought provoking article regarding child support reform.

Lastly, we address the “something else”, what happens to our minor children if we predecease them. Jolyon Acosta provides a primer on estate planning as it relates to parenting.

I hope that you find this issue to be informative and inspiring.

Comments from the Chair of Publications

I am so proud of this Spring Edition because Julia Wyda had a brilliant idea to include pictures of all past Chairs of the Family Law Section in this edition. What a great way to celebrate our 40th Anniversary! We asked each one to provide us with a short statement of what it meant for each of them to be Chair. The response was overwhelming. What struck me the most was how many people remarked on the great friendships they made through their involvement with the Section. I, too, have met some wonderful people since I became involved in 2004 and am privileged to call some of them my dear friends. If you have ever thought about joining a committee, please don’t hesitate. You won’t regret it! On behalf of everyone on the Publications Committee, I hope you enjoy the Spring Edition. Please feel free to email me at Amy@aikinlaw.com if you have any articles, pictures, or announcements you would like to submit for the Summer Edition.
Florida

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By Juan C. Antúnez
Attorney at Law

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Financial Success for the Family Lawyer

By Cary B. Stamp, CFP®, CDFA™, Tequesta, FL

At the 2013 Florida Bar Family Law Section Fall Retreat, Elisha Roy recommended that family lawyers “take care of themselves.” Then, at the Publications Committee meeting, she suggested that the Commentator focus on mental and physical well-being issues. Her remark prompted me to ask, “What about financial well-being?”

Over the past decade, I’ve had the privilege of working with a number of family lawyers on their own financial and estate plans. I also work with corporate executives, real estate developers, construction company owners, and affluent divorced and widowed women. There is a common pattern ... individuals who are accustomed to setting and working toward their goals quickly understand the financial planning process. These people realize that working towards a goal, such as building a nest egg for retirement, is a marathon, not a sprint.

But those people who are unaccustomed to setting long-term goals can get sidetracked by short-term events and gyrations in the stock and bond markets. Often, at the first sign of trouble, there is a tendency to jump ship and abandon a well conceived plan. Of course, the plan can only be abandoned if it was conceived and implemented in the first place.

Here is a quick test I ask prospective clients to take to determine if they have a plan: Can you produce a document that details what your financial goals are, what your life will look like in retirement and the steps you will take to get there? If you do not have such a document or your immediate thought was “it’s all in my head,” you do not have a sufficient plan to get you where you want to be.

Quite simply, a financial plan is a business plan for your life. It doesn’t need to be elaborate or full of charts and tables. One simple page will do if it captures what you want to accomplish and how you are going to get there.

Everyone has different goals, and everyone prioritizes them differently. The more specific the goals are in terms of time and money ... the better. Simply saying you want to retire comfortably isn’t good enough. However, writing down that your goal, for example, is to retire at age 66 with an income equal to 85% of your current take-home pay is much more meaningful.

If retirement is the number-one goal, we’ll start by examining a client’s retirement plan. Many small firms have a retirement plan that was established years ago and may not allow them to maximize their tax deduction and save as much as possible for retirement.

For example, some practitioners do not know that even if they have a small office, they can establish a 401(k) plan for a minimal amount that would allow them to defer as much as $50,000 per year. And if their spouse works in the firm, they could potentially double that deduction. That means a husband making a $50,000 annual contribution to his 401(k), assuming a 6% annual return, could have $659,040 after 10 years. If his wife can do the same thing, they’d have $1,318,079 for their retirement.

Pension plans are another way to produce monthly retirement income. Pension plans can make sense for a sole practitioner or small firm with significant income. Pensions are determined by actuarial calculations and can be implemented to create tax deductions of over $100,000 and sometimes as much as $200,000.

Once the retirement planning issues have been addressed, it’s important to examine current tax status and estate plan and potential liability issues. Issues may include: lack of a liability umbrella policy, a corporate structure that does not allow for maximum deductions, and trusts that have been established but not funded.

Clients often want to pay for grandchildren’s education. My question to them is: How much do you want to pay and for how long? There is a huge difference between two years at a local community college and six years at an Ivy League school. Once I know those specifics, I can come up with the best way to fund that goal.

Another common concern is how to transition the family business or real estate holdings to the next generation with as little estate tax as possible. For instance a client might want to put a vacation home in a family trust and she wants to make sure the trust has enough assets so the house can be enjoyed by her family long after she is gone.

The most common misconception about working with a financial advisor is that they manage clients’ assets and make a good return. Returns are important, but they are only important if clients understand how having additional funds will help them accomplish their goals. I hold the belief that the investment management part of the relationship is a process that any advisor can create if they know the client’s goals.

We also have a bias toward using lower cost investment strategies that passively track an index. Numerous studies have shown that most managers who employ an “active” approach to their process usually cannot exceed the returns of a benchmark index.

The number-one benefit to a written plan that details goals is that it

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Financial Success

will help clients stay focused on the big picture when temporary distractions pop up. A good financial advisor will not be able to predict the markets, will not make every investment go up, and will not provide top quartile returns every year. The main challenge we have with our clients is to get them to look past short-term “noise” and volatility. If we have done a proper job of allocating their portfolio based on their risk tolerance level and time horizon, we believe that downturns in the markets simply present an opportunity to invest more at an opportune time.

I liken this to a family law case where the clients go to war over the living room rug when there are millions of dollars at stake. In the long run, whoever ends up with the rug isn’t going to realize much impact on his or her financial well-being. They have chosen to focus on a minor detail. And they could probably buy a few new rugs with the fees spent on the issue. Likewise, market volatility is a sometimes painful, but minor detail that is present in every investment portfolio. A good advisor will help you with the emotional turbulence and keep you focused on your goals.

We use software that allows us to track our clients’ goals and determine if we need to make adjustments along the way. We schedule each of our clients for a monthly coaching call. We focus on different issues each month (such as taxes, estate planning, charitable planning, and retirement income). But the frequency of these short calls serves as constant reminder to review goals and assess progress. It is not enough to put a plan down on paper; clients need to take action and have some accountability to the process. All change takes time, but with an investment of as little as an hour a month, you can change the course of your financial future and take care of your financial security and that of your family.

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When the Parents Die, What Happens to the Minor Children?

By Jolyon D. Acosta, LL.M., J.D., CPA*, Tampa, FL

Every parent has the important responsibility of planning for his or her children’s future, including the unfortunate contingency of how the children should be cared for in the event of a parent’s death. As with many aspects of life, the earlier parents develop a plan, the more options there are available. The purpose of this article is to address certain practical aspects for parents of minor children1 to consider in planning for the contingency of their deaths. This article will first focus on the care and custody of the children. The article will then turn its focus to the care and management of assets descending to minors upon the death of a parent.

Upon the death of the first parent, the surviving parent remains the minor children’s natural guardian2. The surviving guardian will possess, without the involvement of the court or any person, all powers, rights, and obligations of a guardian of the minor’s person,2 such as the authority to establish the children’s living arrangements, enroll them in school, make medical decisions, and generally address their day-to-day needs for growth and development. The surviving parent, as natural guardian, may also manage up to $15,000 in assets received via settlement, insurance proceeds, distribution from an estate or trust, or certain other statutory specified occurrences.4 Therefore, if no or nominal assets are expected to be inherited by the minor children, no further court involvement or other procedures are necessary to allow the surviving parent to provide for the ongoing care and custody of the minor children.

The death of both parents presents a more complicated circumstance. Parents can plan for the ongoing care and custody of their children by executing a statutorily established Declaration Naming Preneed Guardian,5 which is often completed as part of the estate planning process, where parents put in place their wills, trusts, and other estate planning documents. A Florida Statute allows parents to establish a preneed guardian for their minor children by executing a written declaration complying with specified requirements and filing it with the clerk of court. Production of the declaration “...constitutes a rebuttable presumption that the designated preneed guardian is entitled to serve as guardian.”6 Upon the parents’ death, such person shall be appointed, unless the court determines that such person’s service as guardian is not in the minor children’s best interest.7

Under Florida law, the best practice for parents is to execute a declaration clearly establishing who shall serve as guardian upon the death of the parents. Although practitioners often draft guardianship provisions in a client’s will, and such provisions may provide evidence to the court of the parent’s intent regarding who should care for the minor children, the better and more reliable approach is the use of the foregoing statutorily approved designation.

If the court must select a guardian, it will first consider blood relatives (including by marriage) and then others who possess the skills and ability to serve as guardians.8 Although blood relatives are considered first under the statute, courts have held that non-family members should be appointed when such persons have special skills applicable to the guardianship, or where such appointment is in the best interest of the minor children.9

Guardians are subject to court supervision. Upon their initial appointment, guardians must submit for the court’s approval an annual care plan specifying the manner in which the guardian plans to care for the minor over the upcoming year, as well as an inventory listing all assets of the guardianship.10 Annually, guardians must submit for the court’s approval an updated plan for the care of the minor covering the upcoming year, as well as an annual accounting specifying the use of all guardianship assets over the preceding year.11 Simplified accounting procedures are available in certain cases.12

Minors may inherit assets upon the deaths of their parents. Parents, with the aid of qualified counsel experienced in estate planning matters, should carefully draft their wills, trusts, and other estate planning documents to ensure that their intentions are accomplished. Death is typically the only time when a person transfers all of his or her assets. Therefore, specifying the recipients of such assets, and the terms governing such transfers, is critically important to ensure that the assets are appropriately used for the children’s benefit.

If a parent has not executed a valid will during his or her lifetime, Florida’s intestacy statutes will control the disposition of that parent’s assets upon his or her death. If the parents are married and they have no children outside of their relationship, then the surviving spouse inherits all of the deceased parent’s assets.13 However, if either spouse has one or more children from a different relationship, the surviving spouse will receive only half of the intestate estate (which includes all assets titled in the predeceasing spouse’s name alone and are without a valid beneficiary designation).14 The remaining assets will then descend to his or her children.15 This could lead to a cumbersome situation where the surviving spouse shares title to certain

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assets with the predeceasing spouse’s children. Further, if significant assets pass to minor children, then one or more guardianships must be established to manage the assets for the benefit of the children. Consider a situation where a married business owner holds shares of a closely held corporation, has a child from a prior relationship, has children with his or her spouse, and does not execute a valid Will. The shares will descend ½ to the surviving spouse and ½ in equal shares to the children. Separate guardianships must be established for each minor child (to the extent his or her interest exceeds $15,000), and the surviving spouse and guardians must work together to manage and perhaps sell the shares. Such situations can be largely avoided by way of estate planning, where asset titles are reviewed, wills are put into place, and perhaps one or more trusts are established to hold title to the assets for the benefit of the children.

Although an in-depth discussion of Florida’s homestead laws is beyond the scope of this article, it should be noted that where homestead property is titled in the name of one spouse (and not as husband and wife in a tenancy by the entirety or as joint tenants with rights of survivorship), and such spouse is survived by one or more minor children, then the homestead property descends by operation of law to the surviving spouse and the descendant’s children.16 Recently, Florida’s legislature allowed the surviving spouse the option of electing between a life-estate and a one-half undivided interest as a tenant in common with the minor children.17

Perhaps one of the most troubling aspects of guardianship and the other default provisions under Florida law is that a minor child attains unrestricted and absolute access to inherited assets upon his or her eighteenth birthday. Consider an unmarried parent with a life insurance policy naming a minor as the beneficiary. The child will receive the insurance proceeds upon the parent’s death. Since the child is a minor, however, a guardianship will be established to manage the assets for the child’s benefit until his or her eighteenth birthday, at which time the child will attain unrestricted and absolute access to the insurance proceeds. While one would hope that the child could manage the assets in a mature manner, practically, eighteen years of age is quite young to assume such a financial responsibility.

The life insurance scenario set forth above, and various other situations, can be significantly improved by the implementation of one or more trusts for the benefit of a client’s minor children. There is a wide spectrum of trusts that can be implemented. Relatively simple testamentary trusts can be established within a client’s will. Such trusts are often limited to a trustee holding title to the trust assets until the child attains a certain age (often 25 or older). While the trustee holds the assets, however, he, she, or it is often authorized to use the assets to pay expenses related to the health, education, maintenance, or support of the child. Essentially, the trustee protects the assets and the child by preventing him or her from wasting the assets while the child continues to mature. More complex and stand-alone trusts are often created to accomplish various purposes, including tax planning, establishing a marital trust, or holding title to certain assets such as property located outside Florida or business interests.
Any parent with significant assets (including life insurance), should carefully consider the use of a trust in his or her estate plan. Although there will be transaction costs associated with establishing a trust, the costs of establishing and maintaining a guardianship in the event that a parent dies leaving minor children will likely far exceed those costs. Further, even in the event that a guardianship is still necessary to care for the minor child’s person, such proceedings will be limited to the personal aspects of the child’s care, because his or her assets will be managed privately by the trustee.

It is my hope that this article serves to aid family law practitioners in understanding some of the key issues associated with advising clients with minor children. Although no one likes to consider his or her own death, especially where minor children are involved, it is an important responsibility of every parent to establish a plan for the care and custody of his or her minor children, as well as for the assets they shall inherit. Although default provisions such as those related to guardianship and intestacy attempt to remedy many potential issues, I have found the result of these processes is often unacceptable to parents. A sound plan incorporating an analysis of asset titles and estate planning tools such as wills, trusts, and declarations naming preneed guardians should be considered in an effort to ensure that the parents’ intentions are accomplished.

Jolyon Acosta was born and raised in Tampa. Mr. Acosta is a Certified Public Accountant and, prior to entering the legal profession, he practiced as a CPA with PricewaterhouseCoopers in Tampa, Florida and a consultant with Accenture out of the Washington D.C. and Atlanta, Georgia offices. His law practice focuses on wills, trusts, estate planning and administration, guardianship administration, taxation, corporate law and partnership law. He graduated from the University of Florida with his LL.M. in taxation in 2007, his J.D., magna cum laude, in 2006 and participated in the University of Florida Law Review and Order of the Coif; he received his M.S. in accounting from Virginia Tech and his B.S. in Accounting, magna cum laude, from Florida State University. He has been admitted to practice to the Florida Bar and United States Tax Court.

Endnotes:
1. The author would like to thank Traci L. Koster, Esq. for her contributions to this article.
2. Generally, under Florida law the disability of nonage is removed for persons 18 years of age or older. Fla. Stat. §743.07 (2013). Discussion of emancipated persons under the age of 18 is beyond the scope of this article.
3. Very generally, Florida guardianship law is divided into two broad categories, guardianship of the “person” addresses the day-to-day aspect of a person’s care and custody, while guardianship of the “property” deals with the assets included in the guardianship estate.
9. See, Morris v. Knight, 1 So. 3d 1236, 1239 (Fla. 4th DCA 2009) (holding that non-relative former neighbor was better suited to be appointed guardian than cousins who also petitioned the court, because neighbor was fit to serve as guardian and ward wished to have neighbor serve as guardian); In re Guardianship of Sallie B. Stephens, 965 So. 2d 847 (Fla. 2d DCA 2007) (affirming appointment of professional guardian over ward instead of relatives).

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A Tale of Two Cities/Homes

By The Honorable Sally D.M. Kest, Ninth Judicial Circuit, Orlando, FL

One of the most difficult contested matters involves relocation of a parent and child. If relocation is denied, a parent may be forced to move from the area, leaving the child with the other parent. If relocation is granted, there is the difficult process of providing a post-relocation time-sharing schedule, especially when there is a substantial distance between the two parents’ homes.

The impact on the child can be enormous. The child will have one set of friends at school that the child will not see on holidays and at vacation times. The child will have weekend, holiday and vacation friends at the other parent’s home. This is necessitated by the fact that children attend school, and cannot attend different schools on a monthly or bi-monthly basis in order to accommodate the parental contact after a relocation.

The concept that the court should have jurisdiction over a parent’s future residence has evolved over time. In the past, when “custody” was given to a parent, there was no limitation on either parent moving to any location he or she chose. With “Shared Parenting” now the law, parents are required to obtain permission from the other parent, or the court, if they plan to move 50 miles or more from their current residence for a period of 60 consecutive days or more. This is consistent with the public policy of the state of Florida which states:

“It is the public policy of this state that each minor child has frequent and continuing contact with both parents after the parents separate or the marriage of the parties is dissolved and to encourage parents to share the rights and responsibilities, and joys, of childrearing.”

The relocation statute creates a framework for the determination whether, or not, to allow a parent to relocate. In my experience, many pro se litigants, and even attorneys, do not comply with the statute. Factors the court must consider involve the child’s relationship with the parents, siblings and other significant persons in the child’s life. The court must also consider the impact of the move on the child, considering the child’s age, physical, educational and emotional development and any special needs of the child.

However, many attorneys present their case for relocation without presenting evidence regarding these express factors involving the child’s relationships. I have found that they are often fixated on the fact that the relocating parent will have more time and money, or be happier. Often the argument is made that if the relocating parent will have more free time, and be happier, then the child will, therefore, be happier.

The attorney, for the relocating parent, will argue that the post-relocation time-sharing and contact for the non-relocating parent will be adequate to foster the relationship. The relocating parent will often minimize or criticize the involvement of the non-moving parent. However, the impact these changes will have on the child is seldom addressed.

Another argument frequently made is that the parent/child relationship will be as good, or better, because the child and non-relocating parent will have extended time during school vacation periods. This ignores the benefit of daily or weekly parent/child contact, which allows the parent to be aware of, and involved in, the daily life, friends, school and extracurricular activities of the child.

The impact on the child who spends most or all holidays, school breaks and summer break away from home where he/she attends school can be significant. Many, if not most, childhood friendships are established in school or their neighborhood. When a parent relocates, often the contact for the non-relocating parent is during school breaks. The court hearing the case is going to focus on the child, and the child’s relationship with both parents. Anyone who has tried to maintain a long distance relationship understands the difficulty this situation presents for the child. Attorneys must remember that the court has a responsibility to the child, not just the parents. The post-relocation time-sharing schedule must also be evaluated in light of the financial resources of the parties, as well as the logistical considerations of travel and activities of the child.

The statute that governs parental relocation has very specific requirements. There is no presumption for or against relocation, but there are a number of factors that the court has to consider. The best interest of the child is, of course, the guiding principal.

One problem in relocation cases is balancing the statutory factors relating to the parent’s reason for relocation. The typical reasons for relocation include: the remarriage of a parent, a new job offer, a job transfer, a desire to pursue additional educational opportunities, or a desire to be closer to extended family. While these life events may result in some positive benefits for the child, the court must balance these benefits against...
the loss of regular and consistent contact with the non-relocating parent.

In most of the cases this court has heard, the attorney for the relocating parent focuses on the advantages of the move for that parent and the child. This court has not seen a case where the child’s loss of the frequent, often weekly, contact with the other parent is addressed by the relocating parent. Failure to acknowledge that the move will significantly affect the parent/child relationship can result in the court denying the relocation. The judge must consider the feasibility of preserving the relationship with the non-relocating parent.

Seldom would the parent who wishes to relocate accept the contact schedule that is being offered to the non-relocating parent. The moving parent generally will only see the positive reasons for the move, and fail to recognize that the child will be experiencing a loss of current friends and a loss of contact with the other parent. The lack of evidence relating to the impact of the move on the child, and what can be done to alleviate some of the negative impact can result in an order denying the relocation.

The court is required to evaluate the reasons of the parents for seeking or opposing the relocation. Is the relocation being sought in good faith? What is the extent to which the opposing parent has met his or her financial obligations and time-sharing schedule?

The non-relocating parent who attends all school field trips, performances, teacher conferences and participates with the child in a sport, artistic activity, religious or other activities will not be able to replace the loss of this relationship. In order for the court to make the appropriate findings, and make a reasoned decision regarding the relocation, the facts presented at the evidentiary hearing must address the statutory factors.

The extent to which the parent wishing to relocate has fostered the parent/child relationship with the non-relocating parent is another factor to be considered. Has the relocating parent been supportive of the child’s relationship with the extended family of the other parent? The attorney for the relocating parent will often try to minimize the non-relocating parent’s involvement with the child. When this argument is made, unless it is supported by the evidence, it often results in the court viewing the relocating parent as not fostering a parent/child relationship with the non-relocating parent. This can have a negative impact on the court’s decision regarding whether to allow the relocation.

The potential advantages of the relocation for the parent does not always mean that the child will experience only positive results. The child, depending on the age, cannot totally appreciate the impact of the move. Friends that the child has seen daily will move on to other relationships after the child moves. Even if the child returns on holidays and summers, the relationships will not be the same. While it is difficult for adults to maintain long distance relationships, research suggests it is even more difficult for children.

“Relocation” means a change in the location of the principal residence of a parent from his or her principal place of residence at the time of the last order establishing or modifying time-sharing, or at the time of filing the pending action to establish or modify time-sharing. Note that it is the parent’s residence that is restricted. The statute appears to be addressing the “Shared Parenting” issues that would certainly be complicated by one parent moving. Note also, relocation prior to filing any action or any court order is not governed by this section.

A. If the parents agree to the relocation they are required to have a written agreement that complies with the statute which includes the following:

1. Consent of all parties to the relocation;
2. A statement that defines an access or time-sharing schedule for the non-relocating parent;
3. A description of the necessary transportation arrangements for time-sharing.

The agreement must be ratified by court order without an evidentiary hearing unless a hearing is requested in writing by a party within 10 days after the agreement is filed with the court. If a hearing is not requested (within the 10 days of filing) the court may enter an order ratifying the agreement.

B. If there is no agreement the parent seeking to relocate must file a petition to relocate and serve it on the other parent. The petition to relocate must:

a. Be signed under oath or affirmation under penalty of perjury and include:

continued, next page
b. A description of the location of new residence, including the state, city, and physical address, if known:

c. The home phone number of new residence, if known:

d. The date of intended move:

e. A detailed statement of the specific reasons for the proposed relocation. If the reason is based on job offer that has been reduced to writing, the written offer must be attached to petition.

f. A proposed revised time sharing schedule with proposed transportation arrangements necessary to accomplish the time sharing after relocation.

g. A statement that an objection must be filed within 20 days of service of petition or relocation will be allowed.

2. The Petition must be served on the other parent.

3. The parent seeking to relocate has a continuing duty to provide current and updated information as it becomes known.

4. If the other parent fails to timely respond to the petition, the relocation is presumed to be in the best interest of the child and absent good cause, the court should enter an order stating that the order is entered as a result of the failure to respond and adopting the time sharing and transportation set forth in the petition.

5. If a response is timely filed, the parent may not relocate and must proceed to a temporary hearing or trial to obtain court permission.

6. The objection to relocation must be verified and include the specific factual basis for seeking a prohibition of the relocation. This includes a statement of the participation or involvement the objecting party currently has in the life of the child.

On a temporary basis the court may order the return of a child if a parent relocated without permission or the court may grant a temporary relocation pending a final hearing. The court must make certain specific findings if a temporary relocation is allowed. These include Petition was properly filed and

There is a likelihood that the court would approve relocation at a final hearing

The court may require appropriate security to guarantee the court ordered contact will occur.

There is no presumption for or against relocation. The court must, however, consider the best interest of the child in every relocation case.

Petitions for relocation are to be given priority on the court’s calendar. If temporary approval of the relocation is requested, the Court must schedule a temporary hearing within 30 days. When the Motion for temporary relocation is filed a copy should be sent, contemporaneously, to the judge hearing the matter so that the hearing can be scheduled. Filing a Motion with the Clerk of Court without sending a copy to the Judge may cause a delay in setting the hearing. A request for the hearing should also be sent to the judge at the time the motion is filed.

The relocating parent has the burden of proving, by a preponderance of the evidence, that the relocation is in the best interest of the child. Once this is done the burden then shifts to the non-moving parent to prove, by a preponderance of the evidence, the location is not in the child’s best interest.

The decision to permit or deny a parent’s relocation is controlled by the statute but is fact intensive. The attorney or the pro se litigant must adequately present the facts in the individual case that will support the relocation. This task is more difficult with younger children with older children. There must be recognition of the significant adjustments that must take place in the life of the child in the event of the relocation. The relationship between the child and the non-relocating parent will change.

The parent’s ability to interact with the child regarding school, friends and extra-curricular activities will be impacted. The child’s relationship with classmates and friends will be impacted by the move and travel for contact with the non-relocating parent. The “advantages” of the relocation will need to be presented in order to justify this disruption in the life of the child. The parent who recognizes these facts and addresses them in their presentation will be more likely to have their Petition to Relocate granted.

The Honorable Sally D.M. Kest is a native Floridian. She serves as a judge of the Ninth Judicial Circuit Domestic Relations Division in Orange County. She received her B.A. and J.D. degrees from Florida State University in 1970 and 1972, respectively. She later taught at Rollins College, Valencia Community College and Barry University College of Law. She began her career in 1972 as a judicial aide to Judge Gerald Mager on the Fourth District Court of Appeal. The following year, she became an Assistant State Attorney for the Ninth Judicial Circuit. She worked in that capacity until 1976, when she joined the law firm of Marlowe & Appleton to practice juvenile defense and family law. In 1979, she became a sole practitioner, with an emphasis on marital and family law. She has been Board Certified in Family and Marital Law since 1990. She was elected to the Circuit Court in 2006 and has served in the Domestic Relations, Juvenile Delinquency, and Domestic Violence Divisions. She is married to the Honorable John Kest. They have three children (two lawyers and a teacher) and grandchildren.

Endnotes:
Five Reasons Why Collaborative Divorce is Better for YOU (and your client)

By Lori Caldwell-Carr, Esq., Maitland, FL

When I was asked to write an article for the Spring Commentator, I reflected on our Section Chair, Elisha Roy’s theme for this year “taking care of yourself so you can take care of others.” I decided to write an article that incorporated this theme with what I actually do in my practice that not only takes care of me, but also fills and inspires me to take care of others. The purpose of this article is not to educate or inform the reader on what Collaborative Divorce is or its’ history. For those who don’t know about collaborative divorce I would suggest you visit the International Academy of Collaborative Professionals website (www.collaborative-practice.com).

Collaborative Divorce has been and most likely will continue to be a controversial topic, both locally and nationally. I am blessed to have wonderful colleagues and friends on both sides of the fence and I respect all opinions. However, the reality is that these collaborative professionals are happier and healthier than their non-collaborative counter-parts. Unfortunately, there are times when the only option is to litigate family law cases. For example, court intervention is needed when issues of child endangerment or blatant denial of access exists.

In a perfect world, family law attorneys would have a regular ongoing stream of “A” and “B” list clients that would pay a “fair” and reasonable fee (without having to track billable hours). Additionally, hearing times would be available within days or weeks (not months) of our requests and Judges would never feel the strict constraints of time. And, by the way, opposing counsel would not be totally unreasonable about everything.

The collaborative process jointly resolves many of our concerns and our clients’ concerns. As I stated above, this article is about “taking care of yourself so you can take care of others.” Below I have listed the top five reasons I believe collaborative law accomplishes that for me and, as a result, for my clients. I have also acknowledged some challenges in those accomplishments.

1. CLIENTS - In my experience, the client who chooses the collaborative process generally meets all of the requirements on my check-list for being an “A” or “B” list client. They typically have a higher level of education and income. They are future-focused and not past-focused. They want a “fair” result, but understand that fairness is subjective. Mostly, they are not out to take the other person down or blame their advocate for undesired outcomes.

Statistics show that my collaborative client experience is consistent with other client experiences across the country. The preeminent collaborative organization, the International Academy of Collaborative Professionals (IACP), has more than 5,000 members across the globe. In the IACP’s Spring 2012 issue of “The Collaborative Review”, the IACP provided demographics of collaborative clients. In part, the IACP survey data showed that more than three-quarters of all clients had a four year college education or higher with a significant majority of cases having estates of $500,000.00 or more. Eighty-four percent of the collaborative participants had children together.

Well-educated, high-income earners (particularly those who own their own businesses) are learning about collaborative divorce and asking for it by name. They are particularly interested in the confidentiality of the process and the preservation of relationships for the future of their children.

Challenge – There are times when a client comes to me asking for the collaborative process, because their spouse wants the process. It is imperative to me that I make sure my client consents to the process and is not using the process for an ulterior purpose. Clients must understand and acknowledge that collaborative is an unveiled process with a no “hide-the-ball” element to it.

2. FEES – In the collaborative process, payment of all legal, mental health and financial professional fees are discussed upfront. Typically, clients agree to make payments from a liquid marital asset with the understanding that there will be less to divide at the end.

I have handled many collaborative cases and my fees have always been paid on time, in full and generally without complaint. Though I do keep track of my billable hours and provide my client with a monthly billing statement, the time spent on tracking billing is much lower than an average case. I schedule meetings with

continued, next page
my client to coincide with the full team collaborative meetings. Mental health professionals deal with matters involving children and financial professionals deal with financial matters.

The benefit to the client is there are few surprises from a financial perspective with the client having more input and control over how the money for fees is spent. At each team meeting, the team discusses fees and each professional gives projections as to the status of fees.

Challenge – Studies show that particularly for potentially acrimonious cases the collaborative process from beginning to end is substantially less expensive than the same type of litigated case. However, the upfront retainers for all collaborative professionals is generally more than the initial litigation retainer for two attorneys. Many attorneys offer lower retainers for collaborative matters and some even lower hourly rates. Additionally, many areas have pro-bono and low-bono alternatives. The overall benefit to the client is more of the billable work is transferred from the lawyers who tend to be the highest hourly rate billers to the lower hourly rate professionals who specialize in those areas.

3. TERM OF PROCESS/NOT BOUND BY LIMITS OF THE COURT SCHEDULE – Since the clients’ interest and goals drive the collaborative process, the clients generally determine how fast or slow the process moves. The collaborative professionals typically prepare the clients for three to five full team meetings. This is based upon the clients meeting certain requirements such as getting all of the financial information to the financial professional by the first meeting so the professional can prepare to cover the financial piece at a later meeting. If there are children, they also need to have a schedule for meeting with the mental health professional to complete the parenting plan. The collaborative process is generally more time efficient with professionals working to their strengths.

Any temporary issues that mediate, or a magistrate or Judge would address are dealt with during collaborative process at each meeting. Since the process is generally kept completely out of the court system until the collaborative settlement agreement is signed, there is no concern as to court timelines or judicial discretion. Collaborative cases tend to last months rather than years. At the beginning of the process, you should know when your next three or four full team meetings are and be able to schedule meetings with your client to prepare for each team meeting in advance. There are few last minute surprises regarding scheduling.

The benefit to the client is they drive the process, helping to determine what happens at each meeting; establishing a timeline that they understand and are actively participating in. Clients are not subject to waiting for arbitrary scheduling of mediation dates or hearing times.

Challenge – It is imperative that as many full team meetings be scheduled prior to or at the first full team meeting. Even if some meetings need to be cancelled, it is better to schedule at least three or four full team meetings at the first meeting. It is difficult when you have four professionals and possibly two professional clients to identify three-hour blocks of time where everyone can meet.

4. TEAM APPROACH – The core of what makes collaborative law so fulfilling for me is the opportunity to work with a team of professionals who are working toward the goals set by the clients. Does this mean that there is never a time I think one of the team members is out of line? No. Does this mean that every attorney I have ever done a collaborative case with has been easy to work with? No. Does this mean I always feel the team has my back? No.

The magic is that within the team process I can express these concerns in an honest way that allows me and the other professional to grow. (This is where the doubters start talking about singing Kumbaya and drinking Kool-Aid). The truth is, at the end of each full team meeting the professional team has a 30 minute debrief where we discuss how we did as a team. We honestly appraise how we performed individually and as a team. I have received some harsh feedback at some of these meetings, but it has made me grow not only as a collaborative attorney, but also as an advocate for my clients and the process. My foundation in my collaborative practice is the law.

I can say I have never had a collaborative case that I thought would have ended better through litigation. However, I have had several litigated cases that I thought would have gone better collaboratively.

5. GROWTH OF BUSINESS
It is my hope that I do not have family law clients that are either serial divorcers or have ongoing post-divorce matters, so I know most clients are one-shot deals. Unlike many other areas of law such as corporate, intellectual property or even real estate, we do not get large clients that bring us business in an ongoing fashion. The future of my practice is through my network of referral sources.

Prior to my collaborative training the majority of my referrals came from attorneys that practice primarily other areas of law.
or practice family law but not in my counties. Since being collaboratively trained, the number of referrals I receive from mental health and financial professionals (for both collaborative and non-collaborative cases) has increased.

Mental health counselors, particularly those that provide marital counseling are imminently aware of when a divorce is about to happen and have a true concern for how that process will proceed. Building a network of mental health and financial professionals that trust you with their clients’ lives and money is extremely valuable. These are often the same group of professionals I trust and rely on in my non-collaborative cases.

Don’t take my word that collaborative is better for YOU. Take action…go to the website for your local collaborative organization or to the Florida Statewide Collaborative website (www.collaborativecouncilflorida.com) to find a collaborative attorney in your area and take them to lunch. Ask them if being a collaborative professional has been better for them. Better yet, take a collaborative training course and see what the buzz is all about (training information available at www.collaborativecouncilflorida.com).

Lori Caldwell-Carr is a family law attorney practicing in Maitland Florida as InFocus Family Law Firm. She has a true passion for helping people work through family law matters with the goal of making positive, well-informed and future-focused decisions about their case. Lori is actively involved in the legal community locally, statewide and nationally. She is AV rated from Martindale-Hubbell, a certified family law mediator and a certified trainer by the IACP (International Association of Collaborative Professionals).

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John N. Bogdanoff is a graduate of the University of Florida Levin College of Law (with honors). During his more than 25 year career as a senior attorney at Florida’s Fifth District Court of Appeal, he served appellate court judges Frank D. Upchurch, Melvin Orfinger, Joe A. Cowart, Warren H. Cobb, Robert J. Pleus and Richard B. Orfinger. Additionally, he served as the Court’s public information officer and on the State Appellate Court Continuing Education Committee. He represented the Fifth District Court of Appeal at the National Judicial College’s 2003 program on Media and the Courts. Currently he serves on the Daytona State College Legal Studies Advisory Committee and has been an adjunct professor at the college. Mr. Bogdanoff is also accredited with the Department of Veterans Affairs to present and prosecute administrative appeals on behalf of veterans. Mr. Bogdanoff has successfully argued appeals in the Florida district courts of appeal as well as in the United States Court of Appeals for the Eleventh Circuit.

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Introduction

Study after study has shown that men recover from the financial devastation a divorce brings much better than women do and most family law attorneys point to the still twenty-percent difference in pay between the sexes for the same work as the reason why. No one can argue against facts like these, but is it really the reason? The authors believe that much of the problem was connected to the way time sharing once was apportioned making most fathers part-time fathers, thereby giving their former wives too much need to maintain the marital home. When two incomes that supported one household were now made to support two, both spouses had less need for space and less income to be able to pay for and maintain the marital home. This problem was exacerbated when the wife, earning less than the husband, who couldn’t afford the home, takes on more obligations than the husband does, with permanent alimony lessening the burden.

If the home was older much more of the mortgage payment went to pay down the principal, which violated the Mallard prohibition against using alimony to create savings, while there was nothing left to pay needed repairs on an older home. This caused the home to depreciate in value while the principal on the mortgage was paid creating a zero sum gain. In short, the alimony did nothing to improve the woman’s financial position because of the emotional attachment she had to the marital home. Everyone knew this was happening but just how many attorneys pushed partition of the home, which should have been done in the majority of alimony cases? The same disservice can be found in the way equitable distribution of retirement is usually handled.

Attorneys are routinely ignoring the strong need to address the role of retirement plan division in the divorce and routinely divide retirement plans as an unimportant asset with generic language that reserves jurisdiction and often creates problems afterwards. This totally ignores the client’s need to face retirement someday. The retirement plans have important issues that are not considered and are often lost with the generic language. This is creating huge enforcement problems, mounting professional exposure and lost opportunities for extra fees.

Important New Retirement Plan Concerns

Much has been written in the news media about baby boomers’ preparedness to retire and much of this has to do with the mass exit away from traditional retirement plans paying a defined monthly pension. State and local governments unable to afford them are switching to defined contribution plans where the liability can be restricted to a percentage of compensation and the employee absorbs the volatility of an uncertain market, rather than the employer in the traditional plan. States and municipalities are trying to lessen their liability with a stretched budget by encouraging employees to voluntarily switch to defined contribution plans by offering them a lump-sum option of their accrued pension. It makes no difference whether the marital settlement agreement “MSA” awarded the accrued benefit explicitly as a stated monthly benefit or with generic terms used to describe the amount awarded, either way this creates a contract right of value due the other spouse. A Qualified Domestic Relations Order (“QDRO”) is merely an enforcement procedure to effectuate the terms of the final judgment (of that contract right of value). Relief from the Final Judgment may only be obtained under a narrow set of circumstances, but the QDRO itself must comport with the final judgment. When an employee accepts the lump-sum, he/she destroys the future income that the parties contracted to divide. The employee could have offered to buy out the other spouse’s interest at the time that the contract was executed, but then the buyout would have been based on the contract right of value on the cutoff date. As the circumstances will have changed since the execution of the MSA, the contract right of value is based on the new circumstances and the new valuation date, but valuation parameters used to determine the new value should not suit the changed circumstances (excluding health) of the employee, but the other spouse who is the victim. A State driven buyout (such as a conversion from The Florida Retirement System to the Florida Investment Plan) providing the option incorporates a huge discount in value because there are underwriting concerns that allow people with major health issues or believed health concerns to more heavily elect this option, creating severe underwriting risks. However, many elect this option because of a temporary need for cash or based on fears...
that the state will be insolvent and their benefit not paid. In reality, the fear itself can create the insolvency with too many ill-timed cash outs.11 This is an ongoing hot debate among actuaries, with some warning their clients to moderate its availability. Therefore, in the vast majority of circumstances the contract right of value is much higher than the conversion value paid by switching to the Investment Plan12 but in some circumstance, involving deteriorating health, it can be much worse.13

If the employee needs the consent of the other spouse the question of value can be addressed as a contract right of value (reflecting the value of the monthly benefit that would have been paid) or a conversion value (reflecting the amount offered by the Investment Plan); and which value should be used depends on the circumstances of both parties to the contract, how much either wants a lump-sum and who wants it more, because neither will be able to breach the contract to get the lump-sum if a QDRO enforcing the MSA has already been entered. The issue of breach comes up when no QDRO was entered and this occurs quite often.14

The breach creates an entitlement to the greater of the conversion value or the contract right of value, where most of the time the contract right of value will be the much greater of the two. But when a breach occurs, careful consideration should be given to the forum used because the family court will not award all contract damages, which can include many things besides a contract right of value.15 As it becomes more difficult to obtain hearings before the family courts, they necessarily become less effective in enforcing judgments. On the other hand, when the participant has no other asset besides the retirement benefits, the family court is the only forum because a judgment cannot be levied against the IRA into which the lump-sum is rolled.

A new skill set is required for either the conversion value or the contract right of value. This should be done only by a licensed enrolled actuary because both calculations require pension actuarial expertise. A conversion requires a match up between benefits paid under the same terms. The contract right of value can inspect the value under the most valuable form of benefit, which includes amounts accrued under each optional form and which optional form comes into play depends on the circumstances of each case. The conversion value is seldom paid at the same date that the normal form of benefit is, which now requires an enrolled actuary make actuarial equivalence adjustments to make certain both the accrued benefit converted to lump-sum and the spouse’s share are compared on the same basis. This is not where a crude adjustment may be made using life expectancies, but where an exact to the penny equivalence is made based on the plan’s actuarial equivalence factors. Thus, two qualified experts should come up with the exact same conversion amount. If they do not, one should conclude that one or both of them are not qualified. This concept can be found in ERISA under the definition of a definitely determinable benefit.16 It was created by IRS regulations designed to prevent cutback of accrued benefits, which includes all optional forms of benefits. To the extent this issue is tried as a contract issue outside the family court, the actuary will need to be experienced in all aspects of contract damages. Damages resulting from breach of contract can include more than the contract right of value, depending upon how the contract was breached and whether or not the failure to perform caused additional damages.

Employees who breach contracts often do so based on what is in their perceived best interest. Sometimes that breach can be motivated by a desire to destroy the contracted benefit so the other spouse cannot share it. Sometimes it is based on a genuine belief that the lump-sum is in their best interest and far too often they do the wrong thing for the wrong reasons.

The Problem Living Longer Creates

Few people have a clue just how much money they will need to retire. Thirty years ago, there were fewer than one hundred people over the age of 100 living in this country. As of the 2010 census that number surpassed 100,000. The employee who lives to 100 years of age will likely be impoverished long before then. If the retiree lives very frugally but lives to his or her 90s, the person becomes frail. A slip or fall could put the retiree in a nursing care facility requiring long-term care, where expenses of $100,000 per year are common. As the election often occurs at the first date on which the participant could enter DROP,17 this invariably results in retirement at that early date. It could be at a very young age after only 25 years of service for high risk professions. These people may run out of money by the time they reach their normal social security age, which if they retire young will be age 67. Healthy people need to work to their mid-seventies so they have no need to draw against their cash before. The longer they work the more savings they will have and the fewer years they will need to draw against it. Thus, working more years bolsters a financially rewarding retirement in two ways: 1) It reduces the number of years that the available cash will provide income; and 2) It increases the amount of funds that will be received over fewer years.

A Frank Discussion about Retirement

Family attorneys involved in family law dividing retirement benefits should have a frank discussion with the client about retirement. We are not advocating that family attorneys be involved in retirement planning or estate planning with their clients continued, page 22
Out of State Retreat – Las Vegas
Rethinking the Important Assets
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unless they have special expertise in these areas of law and few family law attorneys do. But that attorney is involved in the division of these benefits either by reserving it for division by a QDRO, actually dividing it by a QDRO, or by overseeing its division with other marital assets. As most employees and their spouses will not be prepared financially for retirement given the disappearance of most privately funded defined benefit plans, the issue of retirement before dividing these benefits should be raised and attorneys should have a frank discussion with them about whether they factored into their planning just how long people live, the much bigger problem of long-term care, and the availability of products to alleviate these concerns that they should be thinking about and pricing after the divorce.

Having done that the attorney who represents the participant should try to preserve as much of the retirement benefits as is possible, and this responsibility has been shirked when the attorney either divides the benefits directly by QDRO, or reserves jurisdiction to do it after the divorce without a competent valuation of benefits. The valuation will identify each piece that has value, which should then be discussed with the client to learn what value, if any, it represents to that client.

On the other hand, the attorney who represents the other spouse should never allow trading it for the house regardless of whether or not alimony is paid. If this client will have trouble recovering from the financial devastation that the divorce brings that client is not likely to have a dime of retirement savings at normal social security age. Inasmuch as the Great Recession changed the landscape of what income will be available for fees this is a good time to reevaluate where that limited money should be spent.

Time to Rethink Priorities
When the bulk of the marital assets are retirement plan assets that is when a much greater portion of the available money should be spent on expert fees. The Great Recession should have taught everyone that the value of real estate is often based on our client's ability to afford a specific amount of monthly benefit causing the home value to increase when mortgage rates decrease. While the value of retirement assets can fluctuate, these changes are momentary with a general trend toward increasing them. There is no reason to prioritize real estate assets before retirement assets. When the homes are partitioned, as they so often should be, jurisdiction should be reserved more often with the home than with retirement plans. And the role that a valuation plays to a retirement benefit should seldom be about trading the benefits for other assets but making sure the correct amount of benefits are divided and by determining which benefit features are important to which spouse.

The attorney need not have a full discussion about all the products available for retirement-planning purposes, but should suggest that their clients investigate long-term care products, especially because state budgets stretched to the limit will likely cut way back on Medicaid, which has been the primary vehicle for funding long-term care for most middle class people. Longevity Insurance

An attorney can also discuss a need to purchase longevity insurance should they have a fixed amount of money to live from. It’s relatively cheap if they buy it very young and it works inversely to a term life policy. A term life policy pays a fixed death benefit if the person dies before expiration of the term. Longevity insurance pays a benefit upon survival to the end of the term. If the client spent too much money too soon he/she receives an infusion of new money by surviving to the life expectancy. The point is to have this discussion to get the client to start thinking and planning options for retirement.

Many Reasons to Do a Valuation as Part of the Process

Non-marital Portion
When the benefit contains a non-marital portion that precedes the marriage, it is the participant's burden to demonstrate it. This can be easy for defined benefit plans but very difficult and time consuming for defined contribution plans.

If it is not done in the defined contribution plan before the final judgment chances are that burden was not met and lost. Many recognize this issue and reserve jurisdiction, but in most cases merely reserving jurisdiction has the same consequence: it is lost. This is because either the information to do it is no longer available or quite difficult to obtain and very costly to do later. For a better understanding of this issue see Reiss and Miller, Defined Contribution Plans, Determining the Non-Marital Portion of Pensions and Retirement Benefits, 83 Fla. B.J. 37 (Feb, 2009). Failing the burden the participant gave away too much retirement benefit.

Most are able to meet their burden in defined benefit plans with a Coverage Fraction. But following Boyett, use of it short changes the spouse wanting to share. That is because Boyett ruled that marital portions that include earning the higher salary after the cutoff date is a violation of F.S. 69.075(7). That result can only occur if earning it involves active effort, because every appellate ruling has concluded that passive earnings are credited to the marital portion until the date it is paid. What’s good for the goose is then good for the gander. If earning it involves active effort, then any improvements on the
non-marital service portions based on the higher salary earned during the marriage creates marital property above and beyond the service worked during the marriage. Depending on the demographics involved this could triple the marital portion and typically increases it dramatically. This extra property is lost if not calculated before the marriage ends for a variety of reasons. See Defined Benefit Plans Determining the Non-Marital Portion of Pensions and Retirement Benefits, 83 Fla. B. J. 37 (Feb, 2009).

DROPP

The Deferred Retirement Option Plan, known as DROP, allows workers of government plans to receive retirement treatment while they continue to work the DROP years. This allows them to accumulate paid retirement benefits, have annual cost of living adjustments attach, and accumulate earnings while the employee pulls down a full salary.

To enter DROP and enjoy the benefits the employee agrees to quit by the end of the DROP period. This election is irrevocable; and other than receiving full pay working the DROP years, the employees are considered retired for all other purposes. That means they cannot later add their spouses on their health insurance if they hadn’t done so before and they face every other limitation accorded retirees. One of the restrictions is they must make an irrevocable form of benefit election upon entering DROP. These elections can involve giving the current spouse an exclusive survivor benefit of either a fixed amount or a lifetime amount. Either way, it gives the current spouse 100% of marital property that the employee cannot share unless a valuation is performed before a final judgment is entered. Worse yet, if the parties were not married the entire time that the benefit was accrued, the beneficiary spouse also receives 100% of the non-marital portion of the survivor benefit. As this is the non-marital property of the employee spouse, but is paid to the beneficiary spouse, all of it should be offset by giving the employee a like value of the beneficiary-spouse’s non-marital property, or 200% of its value if it is offset with other marital property. When these elections are not taken into account, the participant gives away way far too much retirement benefit.

Because most “experts” on this subject are not experts at all, many confuse sharing survivor rights with sharing the cost to provide them. When the cost is shared one spouse receives 100% of property that may be marital and this is offset by both spouses sharing the cost when in fact the same spouse that receives 100% of the marital portion should pay all of the costs associated with it. This is because the marital property survivor-benefit is marital property and should be shared equally, but in reality is paid to only one person. Put another way, if the spouse is made to pay for the full survivor-benefit, the reduced share is the actuarial equivalent of the unreduced share. By paying the full cost of the benefit, the spouse receives a reduced but actuarially equivalent benefit amount. Put yet another way, why should the participant-spouse be required to reduce his or her share to insure the other spouse’s share (unless it is part of an alimony award?) And finally if the participant’s share is not affected and the parties share the cost, the participant’s share is paid with property earned after the cutoff date, which results in a pure violation of Boyett.

Early Retirement Subsidy

An early retirement subsidy is an early retirement benefit that has greater value than the actuarially equivalent benefit measured at the earlier age. Because the purpose for

continued, next page
the benefit is to encourage early retirement, it is not paid unless the participant retires. This does not mean that the benefit is not earned. The California Supreme Court considered the issue and ruled that when the employee earned the subsidy (by satisfying age and service requirements for its receipt) but it wasn’t paid (because the employee decided not to retire) that the employee could be forced to share a benefit that was never earned based on that voluntary decision.\textsuperscript{32} In Florida, we are not that crazy. But, nonetheless, the husband in Boyett argued that the subsidy was not earned because the employee hadn’t retired and it should not be paid even if the employee later retires and is paid the higher benefit. The wife argued that she should not be penalized by a discount based upon a fictional retirement when in fact the husband was not penalized and had not retired. The Court ruled that they both are reduced by the exact same percentage when the husband retires making a subset of early retirement subsidies marital property.\textsuperscript{33}

\textbf{The Blaine Ruling}

However, not all subsidies involve a lesser actuarial reduction leaving open whether other early retirement subsidies are marital property if at the time of division the employee could have retired and received them. The Fourth District Court of Appeals ruling in Blaine\textsuperscript{34} serves as a prime example of the confusion surrounding whether COLA’s and early retirement subsidies are excluded in the marital benefit if the Final Judgment doesn’t include them. This ruling is fact specific and should not be applied to other cases. Most practicing attorneys read the ruling without examining the rationale behind it (which revealed the special set of facts that applied.)

\textit{Blaine} cites to \textit{Howerton v. Howerton}, 491 So.2d 614 (Fla. 5th DCA 1986), wherein the benefit divided had not yet been earned on the cutoff date (Example: 50\% of the monthly benefit paid at retirement, which includes 50\% of all accruals earned after the cutoff date.) Given that the violation had already occurred in the Final Judgment and was not appealed, the Fourth DCA lacked jurisdiction to correct that violation. It was res judicata.\textsuperscript{35} Awarding anything beyond it would increase the amount of error by awarding benefits on top of the breach. As it was assumed that awarding extra benefits increases the amount of error, the court concluded that the extra benefits had to be in the final judgment and res judicata also.\textsuperscript{36} Thus, its ruling had nothing to do with whether early retirement subsidies on top of a division not violating \textit{Boyett} was marital property; and indeed, if Blaine was not related as aforesaid it would contravene the Boyett Supreme Court ruling holding otherwise.\textsuperscript{37}

The issue is crucial because the earlier benefit can be reduced by 50\% and more for early retirement and with a full subsidy nothing is reduced for the employee.\textsuperscript{38} This means the subsidy by itself can be greater than the entire benefit accrued at the early retirement date. Failing to divide it when applicable can result in dividing less than half the benefit available for division.\textsuperscript{39}

\textbf{Cash Balance Plans}

No discussion of retirement planning or dealing with divisional issues is complete without an analysis of the cash balance plan. What is it? Simply put, it is a defined benefit plan that has features of a defined contribution plan. It looks like a defined contribution plan and because of this it presents real problems with its division that are not easily understood. If it started like every defined contribution plan, with zero account balances, the subtle but important differences would not matter to its division in family law. But almost none do. In the larger arena the cash balance plan was sold as a less expensive substitute to the traditional defined benefit plan. It was this difference that created all the problems that surrounds it, including division under family law.

\textbf{History and Legislative History of Cash Balance Plans}

In 1985, an actuary with Kwasha Lipton developed and then wrote a paper about a new plan. This plan would later become a new industry standard and was called the Cash Balance Plan. The Cash Balance plan defines the Cash Balance Account at some future date, usually ten or twenty years into the future. These plans are defined benefit plans because they define a benefit and what contribution is required is strictly dependent on the benefit guaranteed and future market conditions. Unlike the traditional plan, these plans do not define the amount of monthly pension but a lump sum amount at a specific date. What pension it will provide depends strictly on the future short-term interest market.\textsuperscript{40} Most employees elect to receive the benefit as a cash balance single sum benefit, not the market driven monthly pension amount.

The Cash Balance Plan gained widespread popularity with employers because it offers the employee a guarantee against market fluctuation thereby making the benefit a better alternative for the employee while it provided the employer a hedge against the size of liquidity needs, especially if it wanted to buy annuities at retirement to control costs. In essence, this new plan further controlled plan cost. As this latter point was the driving force with large employers changing over to Cash Balance Plans it is important to understand that the cash balance conversion plan itself generally provided scaled down benefits over what was provided when the sponsor offered the traditional pension plan.\textsuperscript{41} In addition, the newer plan provided
less discrimination in favor of older people, which made the plan both portable and more popular with the younger employees. 42

Anti-cutback Rule:

There is an ERISA prohibition preventing cutback of accrued benefits (by amendment). 43 There is also a requirement that the method of accrual cannot discriminate on the basis of age. 44 When a cash balance plan replaced a traditional defined benefit plan a reduction in future accrual accompanied the change (although it wasn’t a requirement of the plan.) Had the reduction occurred with the traditional plan, if the method of accrual discriminated on the basis of age, this could be corrected with the fractional method by deploying a fresh start date in the calculated accrual. The rate of accrual would be recalculated by determining future accruals using the fresh start date.

The problem was created when the cash balance plan started. The accrued benefit under the traditional plan was converted to an opening cash balance amount. Thereafter, it would be credited with a stated and fixed rate of interest. Independent cash balance accruals were based upon compensation and service. The monthly pension that created the opening balance was subject to ERISA’s anti-cutback rule, which is why that monthly pension is grandfathered in. But under a totally new plan, the Cash Balance Account has a zero starting balance and the accruals under the plan do not convert to a monthly pension that is higher than the grandfathered benefit, such accruals are not earnings under principles of family law. This problem results because the grandfathered benefit was the defined amount under the traditional plan but is no longer the defined amount under the cash balance plan. And, for all practical purposes, the employee himself or herself should question whether he or she is earning anything once accruals begin. They do not because they do not understand this technicality. This has got to be the quintessential new headache for dividing the benefits of retirement plans in the 21st Century.

Older participants who learned recent hirers were accruing benefits and they were not cried foul 45 and took the matter to federal court under ERISA prohibition against age discrimination. One court ruled that it violated that prohibition. 46 Most did not. 47 The discrimination was obvious, but actuaries proved it was

Wear Away Accrual

Because the transition from one plan that measured the anti-cutback (of accrued benefits) against the monthly pension converted to a new plan that measured the anti-cutback (of accrued benefits) applied to Cash Balance amount with an opening balance that grandfather in the conversion (from monthly pension to a starting opening cash balance amount), a new concept emerged known as the wear away accrual. The older participant with much service was accruing nothing when the new plan started. This result occurs because the benefit under the new plan was less than the grandfathered benefit converted to an opening cash balance benefit (adjusted for the years of service with a fixed rate of interest.) Once that difference was zero, the participant began accruing cash balance credits under the cash balance plan. It must not be lost that this is very different from the grandfathered benefit measured under the monthly amount discussed above calling into question when the older participant actually begins accruing “real” benefits. Thus, the employee is not earning active accruals (under principles of family law) while the account balance is growing for interest credits only. Once the wear away accrual disappears, the employee begins adding active accrual under the plan, but because the plan grandfathered in a monthly benefit at its inception, if those active accruals under the plan do not convert to a monthly pension that is higher than the grandfathered benefit, such accruals are not earnings under principles of family law. This problem has got to be the quintessential new headache for dividing the benefits of retirement plans in the 21st Century.

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not caused by the new plan. If the new plan began by terminating and liquidating the old plan, the opening balance would have been zero and this problem would never have existed. The way the old plan transitioned to the new plan is where the discrimination occurred. In any event Congress resolved the problem with the Pension Protection Act of 2006 with entirely new rules that covered all retirement plans. But, like all new law that revamps everything, it only resolved the problem prospectively. Therefore, there is a huge hole left there for family law practitioners to deal with as long as there are wear away accruals before 2006 that are part of the marital portion.

Conclusion
The family law attorney of the 21st Century has an image problem created in the 20th Century that can only be cured by 21st Century Solutions. High demand that once favored them has been reversed by oversupply of attorneys. The 21st Century family law attorneys must be sensitive to their public image and insure that the focus of their practice is taking care of their clients’ needs and not on maximizing income. This means they must scrupulously avoid promoting conflict in favor of helping their clients through the divorce process. This involves serious discussions with their clients on how they will survive the divorce rather than catering to their momentary needs. This also involves an attorney follow up after the dissolution of marriage. Otherwise, that attorney will not be able to compete with attorneys who are perceived as being more eager to serve their clients.

The new economic reality making money harder to come by means the retirement plan “Orphan Child” that was an afterthought (only divided by reserving jurisdiction) must be moved to the front of the list. Alimony is harder to get (and may become more difficult if reformers have their way) and must accompany sensible plans following the divorce. Retirement benefits should be on equal footing with alimony considerations, and both parties will eventually retire and have a need for income. In point of fact, given current alimony trends, it might well be more prudent to give greater weight to retirement considerations.

Finally, a presumption of equal timesharing replacing custody of the children, removes the main reason for the alimony recipient to maintain the marital home. Therefore, whenever possible and practical the marital home should be partitioned.

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Jerry Reiss achieved Associate Society of Actuaries in 1982, an enrolled actuary since 1983 and listed in Best Experts in America (2007 – 2012). His articles have appeared over a dozen times in the Florida Bar Journal on a variety of topics.

Endnotes:
1 Mollard v. Mallard, 711 So.2d 1138 (Fla. 2000).
3 Munnell, Golub-Sass, Haverstick, Soto and Wiles, Why Have Some States Introduced Defined Contribution Plan?, Center For Retirement Research – Boston College, Number 3 (Jan 2008).
4 Walter Updegrave, Your Pension: Lump Sum or Lifetime Payments?, CNN Money (Nov. 21 2012).
5 The State of Florida is offering the buyout option to control the mortality risk of people living longer and the risk of volatility of an uncertain market. But by offering the option it puts itself at risk by allowing people to make decisions based on their own health status, which allows people to game the system. Too offset that risk the option is only offered twice and a discount is introduced into its lump-sum amount. Id.
6 Self v. Self, 907 So.2d 546, 548 (Fla. 2d DCA 2005).
7 Diffenderfer v. Diffenderfer, 491 So.2d 265, 269 (Fla. 1986).
8 Before the value could have used an interest rate that reflected the return over the long term. Now the interest rate must reflect the short-term market-based interest rate because the participant either must buy the annuity payable over the employee’s lifetime or provide a sum of money needed to make the purchase.
9 As a contract right of value the value should replace what the injured spouse should receive (and for that reason) the value should be calculated based on the changed circumstances. To the extent the employee retired the value should be determined at the employee’s higher age, reflected a value of missed payments and future payments. Actuarially this value is (mo. pension) x [(N – N) + N / D] = (mo. pension) x N / D, where “r” is the age at retirement, and “x” is the current age a value is determined.
10 When people in bad health elect the option the full value is paid even though the employee may only live to receive a few or no payments at all. This costs the plan far more money. In order to balance this out so it does not FRS will use a much higher rate of return than market rates. The current discount rate in use by FRS is 7.75%. Volume buyers like it may still be able to purchase annuities at a 5.5% or 6.0% rate of return but certainly nothing higher in today’s economy.
12 The Investment plan is a defined contribution plan sponsored by the State of Florida. The employee can only participate in one of the two.
13 See note 10.
14 The employee has rights to any form of the accrued benefit. Only the QDRO awarding a portion of the benefits will override that employee right, subjecting the employee to the same terms and conditions as the QDRO requires. This problem is overcome by allowing the employee such freedoms in the QDRO but then making a reduction in amount entirely absorbed by the employee. But when the employee converts to a lump-sum or payment over a period less than a lifetime, such corrective measures are no longer possible.
15 The only QDRO elections that FRS will accept is the option to control the mortality risk of people living longer and the risk of volatility of an uncertain market. But by offering the option it puts itself at risk by allowing people to make decisions based on their own health status, which allows people to game the system. Too offset that risk the option is only offered twice and a discount is introduced into its lump-sum amount. Id.
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26 Self v. Self, 907 So.2d 546, 548 (Fla. 2d DCA 2005).
27 Diffenderfer v. Diffenderfer, 491 So.2d 265, 269 (Fla. 1986).
how many wouldn’t quit to get their hands on that much money in a lump-sum?

26 Known as Option 2 under FRS.

27 Option 3 or 4 under FRS.

28 Richardson v. Richardson, 900 So.2d 656 (Fla. 2nd DCA 2005) and Diaz v. Diaz, 970 So.2d 429 (Fla. 4th DCA 2007).

29 Id. @ p 680.

30 This is because survivor benefits are separate marital property. See Haydu v. Haydu, 591 So.2d 695 (Fla. 1st DCA 1991); Johnson v. Johnson, 602 So.2d 1348 (Fla. 2d DCA 1992).

31 Mallard v. Mallard, 771 So.2d 1138, 1140 (Fla. 2000) citing Boyett, 703 So.2d 451.


33 Boyett v. Boyett, 703 So.2d at 453.

34 Blaine v. Blaine, 872 So.2d 303 (Fla. 4th DCA 2004).

35 This was an appeal of a QDRO, not the Final Judgment. The time for appealing the Final Judgment had long since passed. Because the Final Judgment already violated Boyett nothing further could be added that was not already part of the Final Judgment. This is all Blaine was about which explains why COLA’s part of the benefit structure are marital property as explained in Kunsman v. Wall, 125 So. 3d 868 (Fla. 4th DCA 2013).

36 If it is part of the property to begin with, the reasoning employed by the Fourth DCA is mathematically incorrect. This is the only way to reconcile this ruling with earlier rulings that provide cost of living increases are marital property irrespective whether awarded in the final judgment under Kunsman or the Fourth DCA rulings before Blaine that Kunsman cites to. It is also the only way to reconcile earlier Fourth DCA rulings that held a valuation is not to include an early retirement discount (citing to the second holding in Boyett), thereby ruling a fully subsidized early retirement benefit is marital property irrespective whether the final judgment includes it.

37 See Note 33.

38 This serves as the reason why we believe the Fourth DCA made a mathematical error coming to that conclusion.

39 At the time the initial brief was filed in the Fifth DCA, the benefit offered by OUC was substantially subsidized with only a 2% reduction for each year early retirement date preceded the Normal Retirement Date, measure against between 5% and 6% for a normal actuarial equivalent. By the time of oral argument before the Florida Supreme Court the subsidy was increased to only a 1% reduction, making the benefit almost fully subsidized. The FRS offers fully subsidized early retirement.

40 It could be based on a fixed rate of interest stated in the plan. This is much less common because the purpose of the plan is to “de-risk” the conversion amount so the employer carries less liability.

41 See note 1.

42 A notable exception exists when combined with cross-tested plans.

43 See 29 USC 1054(g) and IRC § 411(d)(6).

44 See 29 USCS §§ 1001 – 1461.
Do I Need a Valuation Expert or Not?

By Matthew L. Lundy, Esq., Boca Raton, FL
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Evaluating assets and alimony claims in family law cases is often difficult and wrought with potential uncertainty. The hiring of a third party valuation professional – who is most commonly and most credibly a Forensic CPA – can do much to alleviate your concerns about whether financial issues are being properly resolved. Even in those cases where a professional valuation may seem unnecessary, it may behoove the family law practitioner to at least seek out the advice of a third party valuation professional before assuming that the financial aspects of a particular case are simple. If for no other reason, doing so may, and likely will, shift some or all of the liability to the expert for any valuation they conduct. This article will discuss when a family law practitioner should contact a valuation expert, and when they may not necessarily need to do so.

Forensic CPAs and Valuations Generally

In trying to determine the benefits of engaging a Forensic CPA, the trust factor between the parties is an important consideration. The mindset of the client is a major determining factor as to whether you will need the assistance of a valuation expert. If the parties are getting along, their assets, liabilities, income and expenses are easy for you to understand, and they are readily willing to settle their case, then you may find that the hiring of an expert is not necessary. However, the client’s mindset is only one consideration; and, at the end of the day, you are accountable to your client. Thus, it is your responsibility to advise him or her of the need for engaging a Forensic CPA. The questions that need to be asked are as follows:

i) How large and/or complicated are the parties’ assets?

ii) Is there a business connected with either of the parties? If so, are you and opposing counsel able to agree on a reasonable value for that business up front?

iii) How does the lifestyle of the parties compare to their reported income?

iv) What kinds of relief are the parties seeking? Is either making a claim that a particular asset is non-marital?

v) Are there personal expenses being paid through the business and deducted as business expenses, thereby reducing the income of the payor party for purposes of alimony, child support and the payment of attorney’s fees?

vi) If there is a business, from an equitable distribution standpoint, what is its value and what valuation method should be employed?

vii) What documents are necessary to conduct discovery?

The needs of the parties must be ascertained for purposes of alimony. The objective determination of those needs can be accomplished by the preparation of a lifestyle study, which a Forensic CPA can prepare, testify to, and rely on to assist in the settlement of a case.

The use of a Forensic CPA in the management of discovery in a case, which for the most part is financial in nature, allows you to focus on the legal aspects, instead.

What about in the context of retirement plans?

Retirement plans are unique assets in that they show up in both high asset, high-income cases, and low asset, low-income cases. Thus, they require attention by all family law attorneys, no matter the client base.

Traditionally, the payout from a defined benefit pension plan (“DBP”) has – and still most commonly does – come in the form of an annuitized monthly benefit at a predetermined retirement age. Overwhelmingly, the value of the periodic annuity (i.e. the amount payable at the participant’s normal age of retirement) is ascertainable from the plan itself at no cost to either party. The administrators for DBPs may require a subpoena for such information, but generally, this estimate is available upon request and can often be tailored to a specific valuation date, or one close thereto, depending on plan rules. Thus, if the parties do not wish to know anything beyond the value of the monthly benefit at normal retirement age, based on the life expectancy of the participant, then the use of a valuation expert may not be necessary.¹

On the other hand, if the parties wish to reduce the estimate to a lump sum present value, then the inclusion of a third party valuation expert (or competing experts) may be advisable.

This is because the use of a present value generally depends on the parties agreeing to a particular interest/discount rate (or rates). Unless both parties and/or their attorneys can agree to these rates, issues may arise as to the appropriate rates to be utilized in the calculation. Issues may
also arise as to life expectancy, the value of survivor benefits\(^2\), and the impact of mechanical aspects of the pension on valuation. In those cases, a CPA or actuary is going to be the best person to speak with.

A defined contribution plan (“DCP”), such as a 401(k), employee stock ownership plan (“ESOP”), or thrift savings plan, generally presents less confusion than a DBP because these accounts have cash balances. However, one issue that does frequently arise with regard to these plans is tracking passive gains/losses. In some cases, doing so may require a detailed tracing of particular assets in multiple sub-accounts over a long period of time. In those cases, unless you are absolutely sure that you can confidently trace the rate of return, you will likely want to seek the help of a valuation expert. Further, in the event that there has been a disruption of the investment (such as a withdrawal), it may be necessary to trace a portion of the account that might still be in place had it not be disrupted. In such a case, it may be necessary to engage a financial expert.

**Conclusion**

The decision to engage a Forensic CPA or other valuation expert is case specific. A good rule of thumb is to consult a Forensic CPA whenever you may be in doubt.

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**Endnotes:**

1. This is generally not the case with the military. The military typically will not calculate a monthly benefit for active members, unless the member has obtained the necessary 20 years of creditable military service that would enable the member to retire immediately.

2. See, e.g., *Diaz v. Diaz*, 970 So. 2d 429 (Fla. 4th DCA 2007) (holding that a trial court erred in not valuing the entirety of pension benefits, including survivor benefits).
Child Support: Glitch, Pitch & Stitch

By Raul Perez-Ceballos, Miami, FL

Arguably the statute most habitually reviewed by family law practitioners is §61.30, Fla. Stat. (2013) which “presumptively establishes the amount the trier of fact shall order as child support . . . .” Google reports its users search the term “Florida child support calculator” over 9,900 times per month on a local level. Within the perpetually wild rainbow of law, home to more than Fifty Shades of Grey, the guidelines double as a foretaste of monochromatic justice; i.e., actual black and white law. Since the guidelines assertively stand as the only recognized authority in Florida on child support, we follow them gallantly at times, oblivious or apathetic of its intricate and buried defects.

Act I: Identifying the Glitch

One such defect exists when applying § 61.30(11)(b), Fla. Stat. (2013) providing for an adjustment of child support where “each child spend[s] a substantial amount of time with each parent . . . .” The adjustment seems to be obligatory as the language used reflects “the court shall adjust” rather than may adjust. See also Guttler v. Guttler, 798 So. 2d 888 (Fla. 4th DCA 2001)(finding said deviation to be mandatory). A substantial amount of time is statutorily defined as exercising “time-sharing at least 20 percent of the overnights in the year.” The logic and intent behind this provision is that child support should trail the child. It stands to reason that if a child spends less time with hypothetical parent “A” and more time with parent “B”, the net effect is that parent A’s child expenses decrease while parent B’s expenses increase; therefore, parent B’s child support payments to A will decrease in an attempt to achieve a healthy and equitable balance.

While the legislature’s intent boils down to providing parents with a financial incentive or redistribution of support for spending time with your children, in some cases, the approved formula has the opposite effect. Consider the following alarming examples:

Example 1

Obligor earns $3,000.00 monthly net income while obligee earns $1,000.00. The parties have two children and the obligor spends “73” overnights with the child equating to the game changing 20%. After applying the statutory formula, the obligor’s monthly child support is $1,062.60. Taking the same scenario but instead giving the obligor “0” overnights, the child support actually reduces to $966.00. The obligor here is financially rewarded for spending less time with the child. This outcome runs utterly afoul of the public policy of “this state that each minor child has frequent and continuing contact with both parents after the parents separate . . . and to encourage parents to share the rights and responsibilities, and joys, of childrearing.” § 61.13(2)(c)1, Fla. Stat. (2013).

Under Example 1, the mathematics begin to work as intended when obligor spends a minimum of 92 overnights with the children; i.e., 25%. At 92 overnights, the child support amount would be $961.95.

When running the guidelines, caution should be taken to stop at the step before the gross up worksheet begins if the obligor exercises less than 73 overnights. The gross up worksheet begins at paragraph 10 of form 12.902(e) of the Florida Family Law Rules of Procedure and contains the following instructions to that effect:

“Substantial Time-Sharing (GROSS UP METHOD) If each parent exercises time-sharing at least 20 percent of the overnights in the year (73 overnights in the year), complete Nos. 10 through 21 . . . .”

Despite the bolded warning, it is conceivable that a pro se litigant, notary, secretary, paralegal or attorney can mistakenly neglect same and continue to crunch the numbers which would have calamitous consequences. As previously noted, an obligor spending “0” overnights in our example would pay $966.00; however, if the gross up calculation is erroneously applied, the net result would increase to $1,449.00.

Example 2

Obligor here nets $6,000.00 per month while obligee nets $1,000.00. The parties have two children. At “0” overnights, the obligor’s support is $1,615.63. Giving the obligor 20% of the overnights per year would incongruously raise his support to $1,857.95. Under this example, the guidelines don’t start working as intended unless the obligor successfully negotiates “105” overnights with the children amounting to 29%. At “105” overnights, the child support obligation would be $1,609.97.
Example 3

Obligor earns $5,000.00 in net monthly income and obligee earns $2,000.00. The parties, like the prior two examples, also have two children. The minimum child support obligation if obligor has “0” overnights in this example is $1,346.46. At “73” overnights, the child support would bizarrely jump to $1,454.18. Under this scenario, the obligor would have to spend “87” or 23% of overnights to reach an $0.85 reduction.

The following chart illustrates the three scenarios:

### Graph A

<table>
<thead>
<tr>
<th>Example</th>
<th>Obligor’s Net Income</th>
<th>Obligee’s Net Income</th>
<th>No. of Kids</th>
<th>No. of Overnights</th>
<th>Support Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>$3,000.00</td>
<td>$1,000.00</td>
<td>2</td>
<td>0</td>
<td>$966.00</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>73</td>
<td>$1,062.60</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>92</td>
<td>$961.95</td>
</tr>
<tr>
<td>2</td>
<td>$6,000.00</td>
<td>$1,000.00</td>
<td>2</td>
<td>0</td>
<td>$1,615.63</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>73</td>
<td>$1,857.96</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>105</td>
<td>$1,609.97</td>
</tr>
<tr>
<td>3</td>
<td>$5,000.00</td>
<td>$2,000.00</td>
<td>2</td>
<td>0</td>
<td>$1,346.46</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>73</td>
<td>$1,454.18</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>87</td>
<td>$1,345.61</td>
</tr>
</tbody>
</table>

Although only (3) examples are examined, I safely venture to declare that a startlingly plethora of varied scenarios will lead to similar results. This scenario has arisen frequently in my practice. As recurrently as I have encountered it, there is yet to be a district court of appeals to address it. Lawyers are cautioned to always run guidelines at “0” collectively when calculating the gross up method. Norman Levin, who developed a child support software, suggests that lawyers could encourage parties to agree on using the “non-gross method” as one plausible solution. While this alternative undoubtedly removes the superfluous added fine associated with spending substantial time with your child within the realm of the glitch, it still fails to provide an actual credit to the obligor.

Although far removed from a PhD in mathematics, I daringly deduce that this “glitch” in our guidelines may be a by-product of wholly utilizing an incomes share model, inter alia. Our current income shares model simply malfunctions when obligor’s spend between 20-39% of overnights with their children.

### Act II: Serving the Pitch

#### Option 1

This option openly targets the one variable in the Child Support Guidelines Worksheet that is exclusively responsible for causing the glitch; to wit, the requirement in line 10 of the guidelines worksheet to multiply the “Basic Monthly Obligation x 150% . . . .” The 150 benchmark appears in earlier versions of the statute which defined substantial amount of time as 40%. This 40% threshold was amended to 20% on January 1, 2011. It appears that 150% plays well with 40% but not 20% in some cases.

As such, Option 1 suggests varying the number used in line 10 between 120% through 150% depending on the difference in income between the obligor and obligee. The greater the difference in income, where the obligor is the superior wage earner, the lower the percentage will have to be in order for the 20% credit to work. Below I have provided a sample illustration of this theory using the previous examples. The last column shows the percent utilized and the net effect at 20%.

### Graph B

<table>
<thead>
<tr>
<th>Example</th>
<th>Obligor’s Net Income</th>
<th>Obligee’s Net Income</th>
<th>No. of Kids</th>
<th>No. of Overnights</th>
<th>Support Amount</th>
<th>% used on line 10/net effect</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>$3,000.00</td>
<td>$1,000.00</td>
<td>2</td>
<td>0</td>
<td>$966.00</td>
<td>130% = $966.00 $920.92</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>73</td>
<td>$1,062.60</td>
<td>92% = $961.95</td>
</tr>
<tr>
<td>2</td>
<td>$6,000.00</td>
<td>$1,000.00</td>
<td>2</td>
<td>0</td>
<td>$1,615.63</td>
<td>125% = $1,615.63 $1,548.29</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>73</td>
<td>$1,857.96</td>
<td>105% = $1,609.97 $1,428.93</td>
</tr>
<tr>
<td>3</td>
<td>$5,000.00</td>
<td>$2,000.00</td>
<td>2</td>
<td>0</td>
<td>$1,346.46</td>
<td>135% = $1,346.46 $1,308.76</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>73</td>
<td>$1,454.18</td>
<td>105% = $1,454.18 $1,345.61</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>87</td>
<td>$1,345.61</td>
<td>92% = $961.95</td>
</tr>
</tbody>
</table>

While it would abridge matters to use one universal percentage that would work for all or most income variations such as maybe 110% or so, the lower the percentage, the less support will be left for the obligee. In an effort to balance out the child’s needs with the legislature’s intent to provide a credit to obligors exercising substantial time with their children, a sliding scale would seem to be the most equitable route. An example might look something like this:

### Graph C

If obligor’s income is $1,000.00 greater than obligee’s or less, multiply
the Basic Monthly Obligation by:

| $1,000.00-$1,999.99 more | 120% |
| $2,000.00-$3,999.99 more | 125% |
| $4,000.00-$5,999.99 more | 135% |
| $6,000.00-$7,999.99 more | 145% |
| $8,000.00-$9,999.99 more | 150% |

### Option 2

In researching the history of the child support guidelines, it appears that “[t]he guidelines schedule is based on the parent’s combined net income estimated to have been allocated to the child as if the parent and children were living in an intact household.” § 61.29(2), Fla. Stat. 2013. The statute is precise in its use of the word “intact household”. Webster’s dictionary defines “intact” as “entire” and “having no relevant component removed or destroyed.” It thereby follows that the child support amount is intended to cover the costs of a child relevant to one single household. Assuming arguendo that the amount is $1,000.00 and the obligor is responsible for $750.00 and the obligee for $250.00, the full $1,000.00 will be provided to the obligee and/or custodial parent;

continued, next page
in other words, although the parents live in separate homes, only the home of the obligee or custodial parent will receive the total consolidated funds.

Option 2 sharply questions what child support funds are calculated or reserved for situations where the child spends time in (2) households but less than the 20% threshold. Is the obligor parent not spending additional monies, above and beyond the $1,000.00 that the legislature has already decided should be enough for the child? Is the $1,000.00 allocation for the obligee not now disproportionate and plethoric as the obligor must now expend additional resources towards the support of the child? How much is spent on an average child for breakfast, lunch and dinner considering a happy meal typically runs for $3.99? How many obligor parents don’t find themselves in the predicament of having to rent or buy a house with that extra bedroom or bedrooms to provide suitable living quarters for the children? The difference between a one and three bedroom apartment and/or house could feasibly be a thousand dollar monthly difference.

Nineteen percent of the overnights per year equates to roughly 72 days per year. Under the current guidelines, the obligee and/or custodial parent is benefitting from 100% of the total funds needed by the child although the child may only be in that particular household 81% of the time. Historically, the guidelines were developed using indirect estimates because direct estimates were thought to be way too problematic.10 These estimates were arrived at using the following recipe:

a. Expenditures of families with children were totaled.11
b. Expenditures of families without children but with similar standards of living were subtracted from the total in “a” above.12
c. The net is the presumed amount of “expenditures on children.”13

In other words: A-B=Child Support.

The obvious problem with the math hereinabove is the failure to factor in that the child would not consume food or other resources for “x” amount of days per year; to wit, Option B involves slightly increasing the current minimum child support guidelines but providing credits which begin, not at 20% overnights, but rather anything over 0%. An obligor who has time sharing with the child one night in the year should pay slightly less than one who has zero. This option advocates for child support to genuinely pursue the child.

If child support is calculated at $1,000.00 per month, the daily rate is roughly $32.88. At this rate, an obligor who has the child (4) overnights per month, should be entitled to a reduction of $131.52. By not providing that credit, we are now erroneously raising the child support amount to $1,131.52. Worse yet, we are making the obligor responsible for 100% of the additional $131.52 where the guidelines unmistakably provide for both parents to support their children per their respective percentages. See § 61.29, Fla. Stat. (2013) providing “[e]ach parent has a fundamental obligation to support his or her minor or legally dependent child.” See also § 61.30(9), Fla. Stat. (2013)(“Each parent’s percentage share of the child support need shall be determined by dividing each parent’s net monthly income by the combined net monthly income.”)14

To balance the equities however, the current minimum child support should be raised. The premise behind giving a credit to obligors who exercise less than 20% or increasing it for those who don’t become involved in their child’s activities is already provided for under § 61.30(11) (a) & (b), Fla. Stat. (2013) which states in pertinent part that “[t]he court may adjust the . . . child support award . . .[where] . . . the child spends a significant amount of time, but less than 20 percent of the overnights, with one parent . . . or the refusal of a parent to become involved in the activities of the child.”

Option 3

Option 3 probes the use of a “percent-of-obligor’s overnights model” to supply the credit for a parent exercising a substantial amount of time with the child; to wit, the implementation of a sort of hybrid model. Hybrid models are not novel to child support guidelines, they have been utilized in the District of Columbia and Massachusetts.15 In fact, a Report to the Florida Legislature was drafted by the Department of Economics at Florida State University spanning 129 pages wherein the following recommendations were made with respect to our guidelines:

➢ “Consider replacing the current schedule based on the income shares model with a schedule based on the percent-of-obligor model.”16
➢ “If as a matter of policy it is desired that the child support payment reflect the income of the custodial parent as well as the income of the noncustodial parent, consider adopting a hybrid model similar to that used in Massachusetts.”17

In other words, assign a percentage of savings to go along with a certain amount of time spent with the child; i.e., 73 overnights might entitle you to a 20% reduction of the guidelines while 199 overnights entitles you to 80%. The key to unraveling this puzzling equation is finding the “break even point” which currently varies depending on the spread of difference between the income of the parties. By “break even”, I mean the amount of days the obligor parent must exercise with the child before the basic minimum child support amount reflects “0”.

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10 These estimates using indirect estimates because direct estimates were arrived at using the following recipe:

- Expenditures of families with children were totaled.
- Expenditures of families without children but with similar standards of living were subtracted from the total in “a” above.
- The net is the presumed amount of “expenditures on children.”

11 Expenditures of families with children were totaled.

12 Expenditures of families without children but with similar standards of living were subtracted from the total in “a” above.

13 The net is the presumed amount of “expenditures on children.”

14 Each parent’s percentage share of the child support need shall be determined by dividing each parent’s net monthly income by the combined net monthly income.

15 In fact, a Report to the Florida Legislature was drafted by the Department of Economics at Florida State University spanning 129 pages wherein the following recommendations were made with respect to our guidelines:

- Consider replacing the current schedule based on the income shares model with a schedule based on the percent-of-obligor model.
- If as a matter of policy it is desired that the child support payment reflect the income of the custodial parent as well as the income of the noncustodial parent, consider adopting a hybrid model similar to that used in Massachusetts.

16 Consider replacing the current schedule based on the income shares model with a schedule based on the percent-of-obligor model.

17 If as a matter of policy it is desired that the child support payment reflect the income of the custodial parent as well as the income of the noncustodial parent, consider adopting a hybrid model similar to that used in Massachusetts.
Typically, obligor’s with higher incomes and greater spreads must spend more time with their children to reach the break even point. It is imperative to comprehend that if the obligee is paying additional expenses such as daycare and health insurance for the child, reaching the break even point will require greater amount of days with the obligor. In fact, the break even point may even be a fictional notion, wholly non-existent, depending on the amount the obligee is coming out of pocket. The following graph displays the three previous examples with the added break even column below:

<table>
<thead>
<tr>
<th>Example</th>
<th>Obligor’s Net Income</th>
<th>Obligee’s Net Income</th>
<th>No. of Kids</th>
<th>No. of Overnights</th>
<th>Support Amount</th>
<th>Break Event</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>$3,000.00</td>
<td>$1,000.00</td>
<td>2</td>
<td>0</td>
<td>$966.00</td>
<td>277</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>$1,062.60</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>$961.95</td>
<td></td>
</tr>
<tr>
<td>2</td>
<td>$6,000.00</td>
<td>$1,000.00</td>
<td>2</td>
<td>0</td>
<td>$1,615.63</td>
<td>313</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>$1,857.95</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>$1,609.97</td>
<td></td>
</tr>
<tr>
<td>3</td>
<td>$5,000.00</td>
<td>$2,000.00</td>
<td>2</td>
<td>0</td>
<td>$1,346.46</td>
<td>261</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>$1,454.18</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>$1,345.61</td>
<td></td>
</tr>
</tbody>
</table>

In Example “2” above, obligor makes 6x as much as obligee resulting in a break even point of 313 days; conversely, where obligor makes 2.5x as much as illustrated in Example “3”, the break even point drops to 261.

What if the parties have split custody, earn the same net income and there are no added costs such as daycare or health insurance for the child that one party is paying? Will child support always be “0”? After running “10” different scenarios, spanning from $1,000.00 to $5,000.00 in income and shuffling between 1 and 2 children, the answer is affirmatively yes.

Where parties are equal wage earners and spend equal amount of time with their children, the child support ought to be zero. This does not however hold true if there are additional added expenses such as childcare and health insurance pursuant to § 61.30(7) & (8), Fla. Stat. (2013) respectively which has been added into the guidelines and for which one party is otherwise paying. Under those scenarios, there may never be a “break even point” unless the guidelines reflect that the parties will share the costs equally. The steps to proper implementation of this option are as follows:

Step 1: Find the break even point. For argumentative sake, we will use example 3 in Graph D above and use 261 as the break even point.

Step 2: At this juncture we know that 261 days equates to 100% savings. We are now going to assign a 20% savings to 73 overnights. To figure out the remainder of the savings between 73 and 261, we must first subtract the lesser from the greater; i.e., 261-73= 188 days.

Step 3: We then divide 188 days by 3 which equals 62.6. Now we simply add 62.6 days to 73 to find the number which will result in a 40% savings (62.6 + 73=135.6). This process of adding 62.6 days is continued until the break even point, in this example, 261 is reached. Graphically, it would look something like this after minor adjustments including rounding up to eliminate the decimal point:

<table>
<thead>
<tr>
<th>Days</th>
<th>Savings</th>
</tr>
</thead>
<tbody>
<tr>
<td>73</td>
<td>20%</td>
</tr>
<tr>
<td>74-135</td>
<td>40%</td>
</tr>
<tr>
<td>136-198</td>
<td>60%</td>
</tr>
<tr>
<td>199-260</td>
<td>80%</td>
</tr>
<tr>
<td>261</td>
<td>100%</td>
</tr>
</tbody>
</table>

This option could avail itself whenever the customary guidelines results in the glitch. This formula can be used as a failsafe back up to ensure credits are provided as intended by the legislature. Much like prescription medication, this solution is not liberated of side effects. What if there is no break even point because the obligee is paying daycare or health insurance for the child directly and being compensated through the guidelines? In those situations, the daycare expenses and/or health insurance expenses should be temporarily removed from the guidelines while the break even point is deciphered. The credit should then be given and the added daycare and/or health insurance expense should be paid separately in accordance with each party’s percentage obligation.

The methodology espoused here, albeit simplistic, is fairly effective, wholly glitch free and creates consistency across all incomes. Our current system overtly discriminates as to the amount of savings obligors will be entitled to depending on their respective incomes and harshly punishes higher wage earners.

Act III: Applying the Stitch

All of these options and corresponding graphs are not intended to be the precise solution to the 20% glitch dilemma. It is simply displayed for illustrative purposes as a blueprint to unearth the best percentages and equation to utilize to effectuate the mandates of § 61.30(11)(b), Fla. Stat. (2013). Furthermore, the intent of this article is not geared towards advocating a complete reform of the guidelines but rather to suggest the application of a stitch or bandage to the current guidelines to better meet the gap inadvertently created by the legislature in using the same equation which worked for the 40% threshold.
Pending formal child support reform, practitioners may find solace utilizing the following authorities in addressing the glitch quandary:

A. Section 61.30(11)(a)11, Fla. Stat. (2013), which allows an “adjust[ment] . . .[to] . . . the total minimum child support award” where there exists “a reasonable and necessary existing expense or debt” and/or other “adjustment that is needed to achieve an equitable result.” This statute is generally referred to as the catch all statute and is a formidable tool in addressing inequities.

B. Section 61.30(1)(a), Fla. Stat. (2013) allows the court to diverge from guidelines “plus or minus 5 percent, from the guideline amount, after considering all relevant factors, including the needs of the child or children, age, station in life, standard of living, and the financial status and ability of each parent.” Furthermore, usage of this section does not require written findings thereby placing the trier of fact more at ease. This option has also been recommended by Norman Levine.

It is the author’s humble suggestion that a new professional study of the current guidelines should be conducted by a team of experts in the areas of accounting, programming, economics, sociology, finance, etc., to design a mathematical equation and/or program that will work to systematically and progressively decrease obligor’s support obligation once the 20% threshold is reached pursuant to Options 1 and 3 above or at any timesharing above 0%, if option 2 is selected while contemporaneously meeting the needs of children. Said study ought to particularly take into account “the most recent economic data on consumer expenditure patterns” rather than rely on antiquated studies and data. Said study should be performed “at least every 4 years” contemporaneously with the legislature’s statutorily required review of the guidelines pursuant to §61.30(16), Fla. Stat. (2013).

Raul Perez-Ceballos practices family law in Miami, Florida both in administrative and circuit courts. He has authored numerous articles, CLE materials and newsletters and recently spoke at a statewide Florida Family Law Section Seminar on defending child support cases against the Department of Revenue.

Endnotes:
2 https://adwords.google.com. Search was run on 08-14-13 using keyword “Florida child support guidelines”.
5 But see Mitchell v. Mitchell, 841 So. 3d 564 (Fla. 2d DCA 2003) (finding statutes language is permissive, rather than mandatory).
14 It should be noted that where one parent is paying daycare or health insurance and is being compensated for same via the guidelines, this option will not work by adding said extra costs into the guidelines. Said costs would have to be paid separately per the guideline percentages.

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Most family law attorneys delegate all or most of their client’s needs relating to qualified domestic relations orders (QDROs) to attorneys or other professionals that specialize in such matters. This is especially true for defined benefit plans (i.e., traditional pension plans), which are still sponsored by some private employers and governmental entities. It is not uncommon, however, for family law attorneys to prepare QDROs that apply to defined contribution plans, the most common and recognizable of which is a 401(k) plan. To help family law attorneys avoid common drafting errors, this article provides a “top three” list of reasons why proposed QDROs for 401(k) plans are denied by plan administrators. This list is based on my personal review of proposed QDROs on behalf of plan administrators.

I emphasized that this article does not provide a primer on the subject of QDROs. For those needing introductory information, I recommended you review the general QDRO guidance issued by the Department of Labor (DOL), found at: http://www.dol.gov/ebsa/publications/qdros.htm.

1. Mistake Number One – Generic Plan Name

Overview. The provision that causes the most QDRO denials – by far – is the provision providing for the retirement plan name. When the plan name is incorrect, it is typically because a generic name was provided, rather than the formal plan name. As an example, if a company sponsors a 401(k) plan that is formally named “The Company 401(k) Savings Plus Plan”, it is not appropriate to state the name of the plan as “The 401(k) Plan” or “The Company 401(k) Plan” or “The Company Retirement Plan”. These are all generic plan names and not the formal name.

The reason that attorneys provide a generic plan name is usually because the formal name was not provided by either of the divorcing parties. Consequently, a generic plan name is often provided in the divorce decree, settlement agreement and proposed QDRO. While this practice may be acceptable for the divorce decree and settlement agreement, it is rarely acceptable to an administrator of a 401(k) plan.

Governing Law. Plan administrators deny proposed QDROs that provide a generic plan name for both legal and practical reasons. Under the Employee Retirement Income Security Act (ERISA), the name of each plan to which a QDRO applies must be clearly specified in the QDRO.1 The DOL, however, has issued guidance providing that plan administrators need not reject a proposed QDRO using a generic plan name if the plan administrator can clearly determine the formal name.2

For example, if a company only has one retirement plan and a proposed QDRO generically references that plan, the plan administrator should not reject the proposed QDRO on that basis. Unfortunately, however, in practice, most plan administrators disregard this guidance and deny proposed QDROs with a generic plan name outright.

How to Avoid this Mistake. To ensure that you include the correct plan name – for 401(k) plans and any other type of retirement plan sponsored by a private employer – the following actions are recommended:

• Request from the applicable divorcing party a list of all retirement plans from which benefits are being assigned, and obtain all of the following with respect to each plan: (i) the name of each plan sponsor (generally, their current and/or previous employers); (ii) the type of retirement plan (e.g., 401(k) plan or traditional pension plan); and (iii) the plan’s formal name.

• Confirm (or ascertain) the plan’s formal name using the DOL’s Form 5500 Filing Search, which can be found at: https://www.efast.dol.gov/portal/app/disseminate?execution=e1s1.

The Form 5500 Filing Search is a free service provided by the DOL that allows users to determine the formal name of a plan and obtain basic plan information, including the name, address, and phone number of the plan administrator. The only initial information that is needed for the search is the name of the plan sponsor, who is generally the employer.

Finally, if for some reason you cannot find the formal plan name by utilizing the Form 5500 Filing Search, the employer that sponsors the retirement plan should be contacted. A simple phone call or letter from an attorney should be sufficient to obtain the formal name as long as the employer is informed that the request

continued, next page
is being made in connection with the preparation of a proposed QDRO.³

2. Mistake Number Two – Improper Assignment of Benefits

Overview. Another provision that regularly causes QDRO denials is the provision describing the amount of benefits to assign. Drafting this provision can understandably become confusing for family law attorneys because ascertaining and describing the amount of benefits to assign requires a proper understanding of the benefits provided by a401(k) plan. Nevertheless, this provision is the proverbial heart of a QDRO and, consequently, it is incumbent on family law attorneys that it be properly drafted.

For 401(k) plans, the most common drafting mistake related to this provision is failure to include an assignment date – the date the benefits assigned begin to receive gains and/or losses from investments in the plan. For example, assume a party is entitled to $50,000 from a 401(k) plan, together with gains and losses since the date of divorce. In this case, the assignment date is the date of divorce. This date should be specified in the proposed QDRO; it is generally not sufficient to simply state that the party “is entitled to $50,000” from the other party’s 401(k) plan. Prudent plan administrators would view such as description as ambiguous because it does not affirmatively state the assignment date as the date of divorce.

Governance Law. When describing the amount of benefits to assign, ERISA only requires that which is practically necessary: that the description clearly specify a dollar amount or percentage of the benefits to assign, or the formula for determining either.⁴ The determination of the amount of benefits to which a divorcing party is entitled in the first instance is governed by state law, not ERISA; and under state laws, a divorcing party is generally entitled to half of the marital portion of retirement plan benefits.

Importantly, when reviewing a proposed QDRO, plan administrators do not determine whether state law was correctly applied or whether the amount of benefits assigned reflects the intention of the parties and the court as expressed in the divorce decree or settlement agreement.⁵ Simply put, the only concern of a plan administrator when reviewing a proposed QDRO is whether the amount intended to be assigned can be clearly determined within the four corners of the proposed QDRO. How to Avoid this Mistake. Although the amount of benefits can be assigned using a specific dollar amount or percentage, most drafting mistakes with respect to 401(k) plans occur when a specific dollar amount is provided. Accordingly, in an effort to avoid this mistake, the following is an example of properly drafted model language in this regard, which can be tailored accordingly:

The Alternate Payee is assigned [insert specific dollar amount] of the Participant’s total account balance in the Plan, together with any interest, dividends, or investment gains or losses beginning on [insert either: (a specific date) or (the following language: the date a separate account is established for the Alternate Payee)], or the earliest valuation date thereafter (“Assignment Date”). The Alternate Payee’s assigned share of benefits shall be calculated on a pro-rata basis among all of the Participant’s account(s) and investment fund(s).

As noted above, the typical mistake made under this approach is failing to state the beginning date for gains or losses attributable to the assigned benefits – the assignment date. In the model language above, the assignment date is indicated in second set of brackets in the first sentence. Additionally, the language “or the earliest valuation date thereafter” is included for the following practical reason – Plan administrators generally do not revalue an account daily. Consequently, it may not be possible for them to comply with a proposed QDRO that requires the benefits assigned to begin receiving gains and losses as of a specific date.

3. Mistake Number Three – Designating a Beneficiary

Overview. Provisions that attempt to name a beneficiary for the party receiving benefits also regularly cause QDRO denials. For example, frequently a proposed QDRO will state that, in the event the party being assigned benefits dies prior to receiving a complete distribution of his or her assigned benefits, his or her estate shall receive the remainder of such benefits. Most often, the estate or children will be designated as the beneficiaries.

It doesn’t matter, however, if the proposed QDRO is drafted to name the estate, the children, or some other specified person as beneficiary because any beneficiary designation whatsoever, however drafted, should cause a proposed QDRO to be automatically denied. The reason is straightforward: virtually all retirement plans, including 401(k) plans, provide that no beneficiary designation is valid unless it is made in accordance with the plan’s specific procedures for designating a beneficiary.

Governance Law. ERISA does not directly prohibit a proposed QDRO from naming a beneficiary, but it does require a plan administrator to follow the terms of the plan.⁶ And, as previously stated, almost all retirement plans set forth the specific procedures for designating a beneficiary. These procedures typically call for completing and submitting a prescribed beneficiary designation form; rarely, if ever, do they create an exception for beneficiary designations made in a QDRO. Consequently, the plan administrator would be breaching
its fiduciary duties by accepting a beneficiary designation in a proposed QDRO because the manner in which the designation was made does not comply with the terms of the plan.

**How to Avoid this Mistake.** The following is model language that balances the concern of not having a proposed QDRO denied because it contained a beneficiary designation with the desire to at least address the issue of beneficiary designations:

In the event of the death of the Alternate Payee prior to the Alternate Payee receiving the full amount of the benefits assigned under this Order, the Alternate Payee's beneficiary (as set forth by the Alternate Payee's beneficiary designation made in accordance with the terms of the Plan and, if no beneficiary was properly designated, by the terms of the Plan) shall receive the remainder of any unpaid benefit assigned under this Order.

Additionally, it is extremely important that the parties are reminded to make or change their beneficiary designations as soon as possible after a proposed QDRO is approved. The parties should also be reminded that they should confirm their beneficiary designations from time to time to ensure that the designations were properly made and are valid.

**Will Cantrell** practices exclusively in employee benefits and employment law, including the review of QDROs on behalf of employers and the preparation of QDROs for attorneys. He graduated magna cum laude from Florida State University College of Law, earned his M.A., cum laude, from Florida State University Graduate School, and his B.A. from Mercer University. Prior to entering private practice, he served as a judicial law clerk for the Honorable Hugh Lawson, Senior United States District Court Judge for the Middle District of Georgia.

**Endnotes:**
1. ERISA § 206(d)(3)(C).
3. See DOL QDRO Guidance, 2-1.
4. ERISA § 206(d)(3)(C).
5. See DOL Advisory Opinion 99-13A; DOL Advisory Opinion 92-17A.
6. ERISA § 404(a)(1)(D).
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